

Cases—Continued

<i>United Insurance Company v. National Labor Relations Board</i> , 272 F. 2d 446, 304 F. 2d 86.	Page 13
<i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U.S. 474 -----	15

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.)	
Section 2(3) -----	2, 35
Section 7 -----	35
Section 8(a)(1) -----	11, 36
Section 8(a)(5) -----	11, 36

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED INSURANCE COMPANY OF AMERICA

AND

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 21, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 17-33) is reported at 371 F. 2d 316. The findings of fact, conclusions of law and order of the National Labor Relations Board (J.A. 1122-1183; 1199-1200)¹ are reported at 154 N.L.R.B. 38.

¹ "J.A." refers to the Joint Appendix filed in the court of appeals.

U.S.
SUPREME COURT

MAY 19 1967

U.S. F. DAVIS, C.

No. ¹⁷⁸
~~1409~~

In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

UNITED INSURANCE COMPANY OF AMERICA

AND

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THURGOOD MARSHALL

Solicitor General
Department of Justice
Washington, D.C. 20530

ARTHUR GORMAN

General Counsel

DOMENICK H. MANDLI

Assistant General Counsel

MORTON J. COHEN

Assistant General Counsel

MARGARET A. BURGESS

Attorney

National Labor Relations Board
Washington, D.C. 20540

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
1. Hiring and job assignment	3
2. Compensation and expenses	5
3. Supervision and termination	8
B. The decisions of the Board and court of appeals	11
Reasons for granting the writ	12
Conclusion	16
Appendix A	17
Appendix B	35

CITATIONS

Cases:

<i>Metropolitan Life Insurance Co.</i> , 138 NLRB 512	13
<i>National Labor Relations Board v. Coca-Cola Bottling Co.</i> , 350 U.S. 264	15
<i>National Labor Relations Board v. Hearst Publications</i> , 322 U.S. 111	14
<i>National Labor Relations Board v. Insurance Agents</i> , 361 U.S. 477	13
<i>Radio Officers' Union v. National Labor Relations Board</i> , 347 U.S. 17	15

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1966 (App. A, *infra*, p. 34). On March 21, 1967, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including May 20, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The protections of the National Labor Relations Act extend only to employees—a category which excludes “any individual having the status of an independent contractor” (Section 2(3)). In this case, the National Labor Relations Board found that “debit agents” of an insurance company were employees within the meaning of the Act. The question presented is whether, in setting aside this determination, the court of appeals overstepped the proper bounds of judicial review and applied erroneous legal principles.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in App. B, *infra*, pp. 35–36.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

United Insurance Company of America (“United”) is engaged in the writing and sale of insurance²

² United writes and sells industrial and ordinary life insurance, and industrial and commercial health, accident, and hospitalization insurance (J.A. 396–397). It also handles fire insurance written by United Fire Insurance Company. (J.A. 25, 46, 63–67, 1062–1063).

through its home office in Chicago, Illinois, and district offices located in most states. Every district office has a manager and several assistant managers. Each assistant manager is in charge of a staff of four or five individuals called "debit agents"; United has a total of about 3300 such agents. (J.A. 1126, 1165; 41-42, 396-397, 421, 459, 1045, 1046.)

On June 4, 1964, the Insurance Workers International Union filed a petition with the Board seeking certification as the collective bargaining representative of United's debit agents in Baltimore City and Anne Arundel County, Maryland. United asserted that the debit agents were "independent contractors" and not "employees" within the meaning of the Act, and the parties entered into a consent election agreement preserving United's right to contest this issue after the representation proceeding. The union won the election, was certified by the Board on August 14, 1964, and requested recognition from United on August 20. On September 1, United refused to recognize the union. Its only ground for this action was that the debit agents were independent contractors rather than employees. (J.A. 1122-1123, 1132; 8, 1045-1050.) This unfair labor practice proceeding ensued.³

The Board made the following findings with respect to the status of the debit agents:

1. HIRING AND JOB ASSIGNMENT

United obtains debit agents through newspaper advertisements, referrals, and from other companies

³ The union was the charging party before the Board, and an intervenor in the court of appeals proceedings brought by the company to review the Board's order.

(J.A. 403). A prospective agent must fill out an application provided by the company and be interviewed by a District Manager (J.A. 1139, 199-200, 725-727). No prior experience is required (J.A. 725-726, 768, 831).

Upon hiring an applicant, United places him in a particular district office, under the supervision of a particular assistant district manager (J.A. 1165; 40, 42, 147, 854).⁴ The company then assigns him a "debit book." This book—which is company property and must be returned to the company upon the termination of the agent's service (J.A. 1155; 148-149, 473, 490)—contains the names and addresses of existing policyholders in a relatively concentrated geographic area. The debit agent's job is to collect premiums from the policyholders listed in this book, to prevent the lapsing of policies, and to sell such new insurance as time allows.⁵ The collection of premiums occupies the bulk of the agent's time, since he works mainly with industrial insurance which, unlike ordinary insurance, is written in amounts of less than \$1,000 and provides for the payment of premiums on a weekly

⁴ The company may thereafter transfer him to a different location or supervisor (J.A. 1157; 292-294, 480-481). The agent's business card contains the phone number and address only of the district office to which he is assigned (J.A. 757-758).

⁵ Either the agent or the company obtains a license from the State, costing from \$2.50 to \$10.00; which specifically permits the agent to sell insurance for the company. In some instances the company pays for the license; in others, the agent pays for it (J.A. 1138-1139; 24-26, 694, 728, 755, 811). However, the company always pays for the cost of renewing the license (J.A. 1138; 881).

basis.* (J.A. 1137-1138, 1150, 1155, 1169; 23-24, 40-44, 95, 186-187, 216-217, 357, 397-398, 417-418, 694-695, 700-701, 727, 740-741, 756, 815-817, 838, 854, 860-863.)

A debit agent may not, at his discretion, transfer policies or exchange all or part of his "debit" with another agent; company approval is required (J.A. 1160-1163; 74-75, 138-140, 148-149, 243-245, 248-251, 340-342, 359-362, 376-377, 841, 1065). And while debit agents may occasionally collect for each other, they do not have regular employees (J.A. 1140-1141; 148, 219-223, 456-457, 723, 788).

2. COMPENSATION AND EXPENSES

United directly compensates the debit agents pursuant to the "Agent's Commission Plan." The plan—which is unilaterally promulgated by the company, is uniform as to all agents, and must be signed by each agent when he is hired (J.A. 1175; 27, 183, 185, 491-494, 1051-1059)—basically provides that a debit agent may retain 20 percent of his weekly premium collection (J.A. 1175; 1051).⁸ The company also pro-

* While United does not require an agent to work any specific number of hours, it expects him to obtain a high percentage of collections, to avoid policy lapses, and to bring in new business (J.A. 1141, 1143; 131, 238-239, 343, 440, 491, 519, 770-771, 822-825).

⁷ The company may amend the plan at any time and existing agents may then choose to work under the plan they originally signed or under the new arrangement. New agents, however, must accept the most recent plan. (J.A. 1175; 491-494, 706, 893.)

⁸ The agent also receives 10 percent of the premiums collected from holders of ordinary insurance, and 50 percent of the first year's premium on new ordinary insurance sold by him (J.A. 1056-1057). Unlike the industrial insurance premiums, the agent remits the entire ordinary premium to the company and the

vides a "service award bonus," essentially a vacation-with-pay plan under which an agent may take one or two weeks off depending on whether he has one or two years' service with the company and be paid a percentage of the average of his earnings for the previous four weeks. Agents choose their vacation periods on the basis of seniority after their assistant manager has selected his. While the agent is on vacation, the assistant manager collects and sells new business for him, for which the agent receives the usual commissions and credits. (J.A. 1153, 1154, 1156-1157, 1164-1165; 146-148, 474-476, 646-647, 752.)⁹ Debit agents participate in the group insurance plan and profit-sharing pension fund maintained by the company, and the amounts contributed by them are supplemented by the company (J.A. 1176-1177; 71-73, 890, 891, 904, 1098-1104). The company also pays

company then pays him the percentage owed (J.A. 812-815). The "Agent's Commission Plan" also provides for weekly bonuses, ranging from 2 to 5 percent of weekly collections, to agents whose collections average 95 percent or more of the premiums due and who have average increases of 50 cents per week (J.A. 1051-1052). In addition, an agent is credited with a reserve account, essentially composed of premiums on new policies sold by him minus premiums on lapsed policies; and the company adds to this reserve a quarterly bonus if the agent has a 92 percent or better collection average and a 50-cent weekly increase. From this reserve an agent with a 90-percent or better collection average may draw \$1.00 to \$3.50 weekly, depending on his collection average and the size of the reserve. He may sell his reserve to the company every six months if he has a 95-percent collection average and has serviced the debit for more than a year, but the company will not buy reserves exceeding \$500.00. (J.A. 1052-1056.)

⁹ Assistant managers similarly substitute for the agents when they are ill (J.A. 1164; 428, 566-567, 646-647).

employer social security taxes for the agents. (J.A. 1177; 704, 884-889, 923-925.)

In addition to the debit books, United supplies the agents, at its own expense, with rate and premium receipt books; application, transfer, lapse, and reporting forms; and various sales aids and brochures (J.A. 1144, 1166; 44-45, 92, 113-117, 747-748, 1060-1096). At the district offices, the company also provides the agents, free of charge, with work tables, chairs, office equipment such as adding machines, telephone service, clerical help, and the postage used in sending receipts to policyholders who have remitted their premiums by mail (J.A. 1179; 61, 97-98, 121-124, 298-302, 339-340, 446, 725, 1097). When an agent's debit covers a wide area or is a considerable distance from the district office, the company pays him an additional one percent of collection for travel expenses (J.A. 1155, 1176; 357-358, 375, 409-410, 447-448, 519-520, 617). The company assumes the losses resulting from theft of collection monies from agents (J.A. 1170-1173; 149-157, 211-212, 312, 513-516, 573-587, 1115-1116).

Except as noted, agents pay their own telephone, postage, and transportation expenses (J.A. 408-409, 540-541). Those who use business cards and distribute small gifts to their policyholders bear the expense involved (J.A. 1140; 408-409, 507-508, 617-618, 707-708, 757-759, 835, 851-852, 1114). Some agents set aside a work space in their homes and deduct the maintenance involved as a business expense for tax purposes, but none have regular offices for which they

pay rent (J.A. 1179; 125, 230-231, 725, 761, 788, 821-822, 866-867.) Nor have they employees or regular assistants. They do no advertising and are not required to provide a bond. (J.A. 1140-1141; 71, 117-118, 148, 723, 788.)

3. SUPERVISION AND TERMINATION

The high ratio of managers and district managers to debit agents (see *supra*, p. 3) assures the company close supervision of the agents throughout their service (J.A. 1156, 1165; 42, 317, 355-356, 471). At the outset, the assistant manager accompanies a new agent on his rounds to acquaint him with his assigned debit and show him the approved selling and collection techniques (J.A. 459, 727). The agent is also supplied with a company "Rate Book" containing detailed instructions on how to perform many of his duties; the company requires the agent to follow these rules (J.A. 92, 483-484, 1068-1069).¹⁰ Whenever it appears necessary to United, an assistant manager or other company official accompanies an agent on his rounds (J.A. 1164, 1166; 131-137, 517, 594, 722, 743-744). The manager or assistant manager may also call on a policyholder with the agent if a premium has not been collected by the twentieth of the month, and a "supervisor" must call on policyholders whose policies have lapsed (J.A. 1153, 1108, 1112). At least once a year, an assistant manager accompanies each agent on

¹⁰ Managers must approve all applications for ordinary insurance obtained by agents in their first year of service, and, thereafter, must review every such application when the applicant has not had a medical examination (J.A. 1138; 1088, 1111).

a field inspection of the policyholders' premium receipt books (J.A. 568-569).

When a policyholder has not paid his premium for several weeks, the agent must report it on a lapse form, provided by United, which the manager must sign (J.A. 81-84, 1066-1067). Failure to make such a report before the fourth week of nonpayment renders the agent liable for premiums due thereafter (J.A. 620-623, 896-897). If a collection is made before the expiration of four weeks, the agent calls the office and has the listed policy removed from the lapse form (J.A. 82). The company requires the agent to carry lapsed policies in his debit book for 13 weeks (J.A. 362, 377-378, 896-897, 913).

Once each week, on a day designated by United, the agent is required to come to the district office in order to turn over the premiums collected, file weekly reports,¹¹ and attend staff meetings (J.A. 1144-1149, 1166; 41, 54-55, 126-127, 419, 450, 504-506).¹² The reports must be submitted on forms supplied by the company (J.A. 1148-1149; 54-59, 64-68, 420-421, 606, 1060-1064). The "Agent's Weekly Account" form shows the amount of increase or decrease in business for the week and year to date, the total of the debit, the amount of reserve the agent has accumulated, the

¹¹ In the "Agent's Commission Plan," *supra*, p. 5, the agent agrees to "promptly deposit with the Company all monies collected * * * and due the Company" and "warrants the accuracy of his accounts and records" submitted to the company (J.A. 1058).

¹² In special circumstances, a change in the schedule is permitted, or an assistant manager may direct an agent to meet him on the debit in order to turn in new business early (J.A. 1145-1147; 41, 332-334, 363-364, 379-380, 506, 720, 779).

amount of collections for the week, the agent's collection percentage, and the balance due the company (J.A. 1062-1063). The "Abstract of Agent's Weekly Report" provides a ready analysis of the funds which the agent must remit to the company; it also contains spaces for amounts to be paid to the company for social security tax, withholding tax, pension fund, and group insurance (J.A. 68-70, 884-885, 1064). The assistant manager reviews these reports, requires the agents to make the necessary changes, and approves them when correct. He then returns the reports to the agent, who deposits the reports and funds due the company with the company cashier. (J.A. 1148, 1164; 55, 482-483, 1060-1064.)¹³ At the meetings, the managers discuss the latest bulletins and directives from the home office, familiarize the agents with policies on which production is low, ask for pledges of new business, demonstrate sales techniques, and explain new policies (J.A. 1145; 128-132, 529-531, 533, 796-800, 806-808).

At the end of every 13 weeks, the company requires each agent to make, on a form provided by the company, a complete audit of his debit book reflecting the actual paid-up status of each of his policyholders, and then to make a true cash accounting (J.A. 55-58, 1060-1061). In addition, the manager may order an audit of an agent's debit at any time (J.A. 613, 615).¹⁴

Complaints against an agent are investigated by the

¹³ Agents may not settle their accounts by personal check without special permission (J.A. 1148; 68, 450).

¹⁴ A few debit agents also handle claims for United, after first obtaining permission from management. The company turns

manager or assistant manager, and, if well founded, the manager talks with the agent to "set him straight" (J.A. 421, 451-452). Agents who have poor production records, or who fail to maintain their accounts properly or to follow company rules, are cautioned. If improvement does not follow, the company asks them to "resign," or exercises its right under the "Agents Commission Plan" to terminate them "at any time." (J.A. 1142-1143; 442-443, 466-467, 568, 569, 591-600, 609-610, 615-616, 721-722, 1120.)

B. THE DECISIONS OF THE BOARD AND COURT OF APPEALS

On the basis of the foregoing facts, the Board (adopting, save in one particular, its trial examiner's decision) found that the debit agents were employees of United within the meaning of the Act, not independent contractors, and hence that United had violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the union that had been certified by the Board as the agents' representative in an appropriate unit. The Board's order requires United to cease and desist from the unfair labor practices found, to bargain with the union upon request, and to post appropriate notices. (J.A. 1179-1183, 1199-1200.) The court of appeals declined to enforce the Board's order, finding that the debit agents were independent contractors (App. A, *infra*, pp. 17-33).

over the claim to the agent, who verifies it and then returns it for further processing and payment. An assistant manager may either accompany the agent when the latter is verifying the claim or may verify the claim independently. (J.A. 1167, 98-99, 273-277, 474, 521-522, 783-787, 846-849.)

REASONS FOR GRANTING THE WRIT

The court of appeals held in this case that United's "debit agents" were independent contractors rather than employees, and hence were outside the scope of protection of the National Labor Relations Act. This ruling is important not only to United's more than 3,000 debit agents, but to all insurance agents, and, beyond that, to the countless individuals who, although they work for a single company under the company's direction and control, do so for the most part "on their own"—a class that includes, for example, traveling salesmen, collection agents, newsboys and milkmen. The court's ruling also, we submit, conflicts with the purposes of the Act and with sound principles of judicial review.

1. The undisputed facts show that debit agents generally work full time for one company and do business in the company's name and under its detailed and continuous scrutiny, direction and control. They are paid strictly on a commission basis; they bear no risk of loss or opportunity of profit, make no investment of their own and have no independent business establishment. The company provides them with a paid vacation plan and other benefits incident to a normal employment relationship. The elements of independence in the overall relationship of agents to company are indeed minor. To regard these agents as self-employed or independent contractors strains reality.

The court of appeals nevertheless held all of this evidence "consistent with an independent contractor

status," stressing that many of the controls imposed by the company reflect business necessity independent of whether the company operates through employees or independent contractors (App. A, *infra*, pp. 27, 29), and on this basis set aside the Board's order. The significance of this ruling is that, if followed, it could deny the protection of federal labor legislation to a host of workers who have heretofore been regarded as employees even though, like debit agents, they do not perform their work primarily at the employer's place of business. Were it not for this fact, it would be plain that the debit agents were employees. To disregard the other elements of control and to make determinative the single fact that the agents work largely on their own—the apparent logic of the court of appeals' decision—is to curtail the application of the Act radically.¹⁵ The propriety of this approach of the Seventh Circuit¹⁶ is a question warranting review by this Court.

2. The ruling of the court of appeals is erroneous. The root of the error, we believe, is the court's view that those controls over the debit agents which are necessary to protect United's business interests could be given no weight by the Board in determining

¹⁵ Save for the Seventh Circuit's earlier decision involving United's debit agents, *United Insurance Company of America v. National Labor Relations Board*, 272 F. 2d 446, the insurance industry has by and large in recent years accepted without judicial contest the Board's consistent view that debit and similar insurance agents are employees. See, e.g., *National Labor Relations Board v. Insurance Agents*, 361 U.S. 477, 479; *Metropolitan Life Insurance Co.*, 138 N.L.R.B. 512, 514.

¹⁶ This is not the first case in which that circuit has followed such an approach. See n. 15, *supra*.

whether the agents were employees or independent contractors. In many instances, a company will find it impossible to carry out some of its functions without detailed controls over the agents who perform them; the mere fact that such controls may be necessary should not transform individuals who, in any realistic sense, are employees into independent contractors. The "business necessity" test enunciated by the court below opens up a major loophole in the protections of the Act—one which, as mentioned, appears to jeopardize the status of a large number of workers in the insurance and other industries.

3. The court also committed serious error by overstepping the proper bounds of judicial review. The application of the statutory concept of employment to the relationship of a particular company to its agents or workers involves an exercise of judgment that, we stress, is peculiarly within the province of the Labor Board rather than of the reviewing court. In making the determination required by the statute, a multitude of factors—all of the incidents of the relationship—must be assessed and weighed, and there are no hard-and-fast rules to guide decision. An administrative determination of this character is, accordingly, at the very heart of the specialized competence of the Board and should be accorded the highest deference by a reviewing court. So this Court has held with specific reference to the determination of "employee" under the Act. *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130—

131.¹⁷ The court below ignored the precepts of *Hearst* in upsetting the Board's determination—which, we submit, was reasonable¹⁸ and therefore binding—that, all factors considered, the debit agents were properly to be classified as employees rather than as independent contractors. This error should be corrected in the interest of sound administration of the National Labor Relations Act.

¹⁷ Although Congress in 1947, by amending the definition of employee so as to exclude independent contractors, modified the substantive holding in *Hearst*, it did not alter that portion of *Hearst* dealing with the standard of review to be applied. See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 487-488; *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 49-50; *National Labor Relations Board v. Coca-Cola Bottling Co.*, 350 U.S. 264, 269.

¹⁸ There is no merit to the suggestion of the court below (App. A, *infra*, pp. 29-32) that the Board's finding of employee status was tainted by the fact that the trial examiner made reference to the off-stand demeanor of the parties' representatives and their witnesses. First, the Board's finding rests largely on the undisputed facts. Second, a fair reading of the trial examiner's decision shows that his reference to off-stand demeanor was dictum, and played no part in his credibility determinations (see J.A. 1151-1152). Accordingly, contrary to the view of the court below, the Board could, as it did (J.A. 1200, n. 2), disavow the examiner's reference to off-stand demeanor without impairing the validity of his ultimate finding.

CONCLUSION

The petition for certiorari should be granted.
Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
Attorney,
National Labor Relations Board.

MAY 1967.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

September Term, 1966—September Session, 1966
Nos. 15266 & 15589

No. 15266

UNITED INSURANCE COMPANY OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
AND

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO INTERVENOR.

No. 15589

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
AND

UNITED INSURANCE COMPANY OF AMERICA, INTERVENOR.

ON PETITIONS TO REVIEW AND ON CROSS-PETITION TO EN-
FORCE AN ORDER OF THE NATIONAL LABOR RELATIONS
BOARD

DECEMBER 21, 1966

Before KNOCH, CASTLE and SWYGERT, *Circuit Judges*.

CASTLE, *Circuit Judge*. These cases are before the Court upon the petition of United Insurance Company of America (Company) to review and set aside an order of the National Labor Relations Board issued against the Company July 28, 1965, a petition of Insurance Workers International Union, AFL-CIO (Union) to review the Board's order to the extent the order denied the Union the full relief it requested, and upon the cross-petition of the Board to enforce its order.¹ A motion of the Company to dismiss the Union's petition was taken with the case on the merits.

The Board found that the Company violated Section 8(a) (5) and (1) of the National Labor Relations Act, as amended, by its admitted refusal to bargain with the Union, the certified representative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland.

The Company is engaged primarily in selling industrial life insurance, a form of ordinary life insurance in which the policies are written in amounts of less than \$1,000 and the premiums are payable weekly, and for that purpose maintains district offices throughout the country. Each district office has a manager and several assistant managers, and each assistant manager heads a group of four or five debit agents. These debit agents, so-called for the reason

¹ The Union's petition was originally filed in the United States Court of Appeals for the District of Columbia Circuit. The Company thereafter filed its petition with this Court and it was transferred to the District of Columbia Circuit as provided by 28 U.S.C.A. § 2112(a). The Board cross-petitioned for enforcement of its order, and the D.C. Circuit transferred the proceedings to this Court where they were consolidated for hearing and disposition.

that "debit" describes the agent's book listing the policyholders from whom the agent collects premiums, spend most of their time in the collection of premiums, from policyholders residing in a given area. They also solicit applications for new insurance and for fire insurance written by another insurer whose business is also handled by the management and supervisors of the Company.

On June 4, 1964, the Union filed a petition with the Board seeking certification as the collective bargaining representative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland. On March 16, 1964, the Company had entered into a reinsurance agreement with Quaker City Life Insurance Company, a Philadelphia, Pennsylvania corporation, under which, among other things not here pertinent, the Company reinsured the industrial life insurance policies issued by Quaker in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland. Quaker had chosen to maintain an employer-employee relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County were represented by the Union. Upon the effective date of the reinsurance agreement (March 16, 1964) Quaker terminated all of its employees. Some of Quaker's former agents in Baltimore City and Anne Arundel County became agents of the Company. The policies they serviced, and the business they generated, were handled from the Company's Franklin Street district office in Baltimore, a location formerly utilized by Quaker. The debit agents here involved were about equally divided between that office and the company's St. Paul Street district office from which the Company had handled its policies in Baltimore prior to its reinsurance of Quaker's policies and continued to maintain.

On July 6, 1964, the Company and the Union entered into a stipulation for certification upon consent election which by its terms provided that the Company did not waive its contention that the debit agents in the unit were independent contractors and not employees within the meaning of the Act, and that the failure of the Company to contest that issue was limited solely to the representation proceeding. The Union won the election and was certified on August 14, 1964. On August 20, 1964, the Union requested recognition. On September 1, 1964, the Company denied that request. It based its refusal to bargain with the Union on the ground that the debit agents involved are independent contractors and not employees.

The Board ordered the Company to cease and desist from its refusal to bargain, to bargain with the Union upon request, and to post designated notices.

The Board's conclusion that the Company violated Section 8(a) (5) and (1) of the Act is predicated upon the Trial Examiner's findings and conclusions to the effect that the Company's debit agents in the Baltimore City and Anne Arundel County area unit here involved are employees within the meaning of the Act, which findings and conclusions the Board adopted.

The Company contends that the Board's order is not supported by substantial evidence on the record considered as a whole; that the findings and conclusions adopted by the Board are, in material part, the product of subjective conclusions drawn from the trial examiner's personal observations rather than from the evidence; that material comparative testimony, proffered by the Company, was erroneously excluded; and that at the most the testimony of the two witnesses credited and relied upon by the examiner can be regarded as establishing only that the unit was half "employee" and half "independent contractor".

The Union's contentions² are limited to its assertions that the Board erred in denying its requests that there be included in the Board's order a specific direction that the Company bargain concerning the fire insurance aspects of the debit agents' activities and a requirement that the Company, from the date of its refusal to bargain until the discharge of its bargaining obligations, apply to all of the debit agents in the unit the terms of a contract which allegedly had existed between Quaker and its former debit agents; and that the Union is entitled to challenge these aspects of the Board's order as a "person aggrieved". The Company's motion to dismiss the Union's petition in No. 15589 challenged the Union's status as an aggrieved person. The Board takes the position that while the Union is an aggrieved person in so far as jurisdictional purposes are concerned, and therefore this Court has jurisdiction of the Union's petition for review, the contentions of the Union with respect to the scope of the Board's order are wholly without merit.³

Two years prior to the Union's petition for certification in the instant matter the issue whether the Company's debit agents in Pennsylvania were Com-

² Except for those contentions urged by the Union as intervenor in No. 15266 in support of the Board's order.

³ In view of our conclusion that the Board's order is not entitled to enforcement the Union's petition in No. 15589, and the Company's motion to dismiss that petition, are moot. Accordingly, we will not discuss the contentions of the parties with respect thereto. Suffice it to indicate that we agree with Board's position that the Union was entitled to petition for review of the Board's order insofar as it denied the additional relief the Union requested but that there is no merit to the Union's complaints. There was no necessity for a specific reference to the fire insurance activities. Bargaining orders need not specify each individual matter upon which an employer must bargain, particularly where, as here, the threshold question is whether

pany employees or independent contractors was before this Court in *United Insurance Company of America v. N.L.R.B.*, 7 Cir., 304 F. 2d 86. This Court there observed:

"In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do."

And citing *N.L.R.B. v. Phoenix Mutual Life Insurance Company*, 7 Cir., 167 F. 2d 983, and *National Van Lines, Inc. v. N.L.R.B.*, 7 Cir., 273 F. 2d 402, the Court pointed out (304 F. 2d 89):

"* * * that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * * the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. In determining whether the requisite control of manner or means is present, various tests have been employed."

but

"The conclusion must be based on the 'total situation' 'looking at all of the facts in the particular case'".

there is an obligation to bargain. Cf. *San Antonio Machine & Supply Corp. v. N.L.R.B.*, 5 Cir., 363 F. 2d 633, 642. And, there is no basis in the record, either factually or legally, to support the Union's request concerning interim application of an alleged contract.

The Court held (304 F. 2d 90):

"* * * the debit agents are independent contractors. A debit agent is 'on his own'. He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. As admitted by the trial examiner the agent pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. Agents may transfer policies among themselves and are not required to do so by United. An agent retains his own commission from collected premiums. As to selling insurance, the agent '* * * is free to follow the superintendent's suggestion or to devise his own methods.' "

The Court rejected as insignificant the factors relied upon by the Board in support of its conclusion that the agents were employees, and in this connection the Court observed:

"Suffice it to say, we have carefully considered each of the items and categories mentioned, but we are convinced they do not show, in connection with all the other facts and circumstances, that an employer-employee relationship existed.

There are many businesses, and the sale of insurance is one of them, where the management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose 'tools' are their own initiative and personality and who work on their own time and at their own expense. However, some insurance companies

have established an employer-employee relationship such as the company in *N.L.R.B. v. Phoenix Mutual Life Insurance Company*, [167 F. 2d 983] *supra*."

With the critical test firmly established by *United Insurance Company of America v. N.L.R.B.*, 7 Cir., 304 F. 2d 86, and the decisions cited therein, and the nature of the various factors which may properly be considered in applying that test illustrated by that decision, we turn to an appraisal of the record before us giving full recognition to the fact that the issue presented is to be determined on the record in *this particular case*. *National Van Lines, Inc. v. N.L.R.B.*, 7 Cir., 273 F. 2d 402, 407.

Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera* (340 U.S. p. 489) as affording "[s]ome scope for judicial discretion" and approved with the express realization that "[t]here are no talismanic words that can avoid the process of judgment", and the admonitions (340 U.S. p. 488 and 496) that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight" and that the examiner's findings are not to be "given more weight than in reason and in the light of judicial experience they deserve" and "are to be considered along with the consistency and inherent probability of testimony". And *Universal Camera* makes it clear (p. 488) that:

"[A] reviewing court is not barred from setting aside a Board decision when it cannot con-

scientifically find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

And in this connection *Eastern Greyhound Lines v. N.L.R.B.*, 6 Cir., 337 F. 2d 84, reiterates the pertinent observation made in *N.L.R.B. v. Elias Bros. Big Boy, Inc.*, 327 F. 2d 421, 426, after a review of the relevant cases, that:

"In a proper case [the reviewing court] may decline to follow the action of an examiner in crediting and discrediting testimony, even though the Board has adopted the Examiner's findings."

Similarly, in *Portable Electric Tools, Inc. v. N.L.R.B.*, 7 Cir., 309 F. 2d 423, 426, this Court had occasion to state:

"While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be given when evaluating the evidence on the record as a whole."

and that if the Court is not to be "merely the judicial echo of the Board's conclusion" a Board determination must be set aside when the record clearly precludes that determination from being justified by a fair estimate of the worth of the testimony of witnesses or the Board's informed judgment on matters within its special competence or both.

The trial examiner's decision discusses testimony and exhibits of record bearing on various factors relevant to, and to which the examiner attached significance in, the determination of the debit agents' status

as employees or independent contractors. These factors embrace most of those mentioned in our opinion in the earlier case involving the Company's Pennsylvania debit agents (*United Insurance Company of America v. N.L.R.B.*, 7 Cir., 304 F. 2d 86). But, on the record in the instant proceeding, the examiner, although professing that he was not overlooking the Company's testimony that in order to meet or avoid the Board's earlier findings (set aside in *United Insurance, supra*) it had advertently set about to and had made changes, including revisions in the manual the Company furnishes its debit agents, to more clearly reflect the independent contractor status; and while finding that the Company does not fix the agent's hours for debit collections and other services on his debit, and that the agent is permitted to retain his commission from the premiums collected, proceeded to find that the testimony concerning certain of the Company's requirements and practices evidenced such right of control as dictated a conclusion that the agents are employees.

In this latter connection the examiner found that (1) the agent is required to make a weekly report and settlement of account at his district office in the morning of a designated day, use forms specified and furnished by the Company, and comply with its accounting procedures; (2) on the day he so reports there usually is a sales meeting with the district manager which the agent is required to attend, followed by group and individual meetings and discussions between the agents and the assistant manager to whom each agent is assigned; (3) the agent receives assistance from and is subject to supervision by the assistant manager to whom he is assigned; (4) transfers of policyholders between agents are subject to Company approval; and (5) the Company pays travel expense,

provides rent, postage, and telephone, as well as office space in its district office for the agent's use when he comes in to make his weekly report and accounting, and to pick up mail and telephone messages.

We find no support in the record for some of these findings and but tenuous support for others. Those which are supported by substantial evidence are, in our opinion, consistent with an independent contractor status. They are not indicative of an existence or exercise of control directed to the "manner and means" by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors.

There is lack of evidentiary support for the examiner's findings that the Company pays travel expenses and furnishes rent, postage and telephone. In this respect the record merely discloses that where the policyholders making up an agent's debit are dispersed over a large area his commission is 1% more than the normal rate. There is no payment of the agent's actual travel expenses. The record does not establish that the Company furnishes or reimburses the agent for postage. It shows only that if a policyholder mails a premium to the district office together with his premium receipt book the Company mails the book back to the policyholder at its own expense. With respect to "rent", "telephone" and the furnishing of "office space" the record divulges only that during the three or four hours a week the agent spends in the district office of the Company, usually on the morning when he makes his weekly report and

accounting, tables and chairs are made available in the district office which the agent may use while preparing his report. Likewise, the agent may occasionally use the Company telephone while he is in the district office or receive a telephoned message which has been left for him.

There is testimony that where a policyholder moves from the area serviced by the debit agent or the agent secures a new policyholder outside of the area normally serviced by him* he may arrange, subject to Company approval, with the agent who does serve the area involved for a transfer of the policyholder to the latter. There is other testimony that transfers are freely made between agents without first securing Company approval. In any event, it is our opinion that this transfer of business factor is not of critical significance. Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent.

There is testimony, some of which is not harmonious, concerning the "assistance" furnished and "supervision" exercised by the Company assistant managers, each of whom is assigned a group of four or five debit agents. Thus, while it appears that the assistant manager's association with the debit agent continues after the agent's initial training period, and the assistant manager may determine if and when he elects to accompany the agent on his rounds in the servicing of his debit, there is also testimony that the primary purpose for so doing is to assist the agent in the conservation of business—the calling on policyholders in

* Each agent has a state-wide license to solicit insurance and is not restricted by the Company in obtaining new business.

connection with lapsed policies—and aiding the agent in procuring new business on which the latter receives the commissions. The assistant manager reviews the agent's reports, requires him to make necessary changes if the accounting is not correct, and cautions the agent about poor production when necessary. During periods of an agent's absence from his debit for a week or more because of illness, or while taking a vacation, the assistant manager, if available, will take over for the agent. Thus, while the assistant manager assists the agent and "supervises" the agent in the latter's relationship with and accounting to the Company it is hardly a supervision which entails the control of the "manner and means" as distinguished from the results the agent is required to obtain. The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case.

The testimony concerning attendance of sales meetings and with respect to discussion conferences with the assistant manager on the occasions of the weekly reports to the district office if appraised as evidencing Company insistence upon such attendance is, nevertheless, equivocal. The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts. The trial examiner's appraisal of the testimony upon

which his findings relating to the above factors were predicated was made on the basis of a credibility resolution that the General Counsel's chief witness, Ronney E. Scott, a former employee-debit agent of Quaker and the chairman of the Union's local, whose display of "evident partisanship" was recognized, "was a reliable witness" and "I credit his testimony generally" as contrasted to what the examiner characterized as "the patently unreliable aspects" displayed by the Company's witnesses.⁵

And the appraisal of the testimony so made by the trial examiner, and the resulting findings he made from the testimony he credited, were accompanied by and made in the context of his observation that:

"To the extent if any that I may rely on demeanor in the hearing room, I would now report that without exception the agents did not display or appear to have attributes of independence (not even when the 'ringleader' appeared to assert himself as he testified), but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard."

⁵ The General Counsel presented the testimony of two witnesses Scott and Don Ramon Jenkins, both of whom were members of the Union and had been employee-debit agents of Quaker before becoming agents for the Company. Jenkin's comparatively abbreviated testimony supported that of Scott in some particulars. The Company presented the testimony of four of the debit agents, and it was stipulated that the testimony of six others, identified for the record, would be of the same general tenor as that of the four who testified. Additional Company witnesses included its vice-president and general counsel, its agency vice-president, and the district manager, who was formerly a Quaker manager.

and of his reasoning, set forth in a footnote, that:

"* * * there appears to be no good reason for excluding demeanor in the courtroom when the witness is not on the stand and where it is clearly observable as in this case; * * * Without attempting to detail the basis for this necessarily subjective finding, and allowing for an independent contractor's possible concern over renewal or termination of his contract, I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties."

A witness' demeanor as a criterion of credibility is generally related to a witness' manner while on the stand or manner of testifying. And although the off-the-stand appearance or conduct of the witness may properly be considered in determining his credibility when it constitutes an observable physical fact, the off-the-stand demeanor here relied upon by the examiner was not based on his observation of a simple physical fact but was predicated upon such subtle manifestations of human reactions as "obsequiousness" and "courtesy" to which the examiner applied his own view or predilection as to what attitudes are "characteristic" of relationships between employers and employees and between independent contracting parties. In our opinion resort to conclusions drawn from the application of such an elusive subjective standard as the examiner here puts forth is improper and that conclusions so drawn do not afford an ac-

ceptable basis for a credibility appraisal much less can they supply any independent evidentiary content. *Kovacs v. Szentes*, 130 Conn. 229, 33 A. 2d 124.

In adopting the trial examiner's findings, conclusions, and recommendations the Board specifically disavows reliance upon the demeanor "observation" made by the examiner. But we do not perceive how this disavowal can serve to remove from the examiner's findings and conclusions the flavor with which his demeanor observation tainted them. *Cf. Wheeler v. N.L.R.B.*, D.C. Cir., 314 F. 2d 260, 263; *N.L.R.B. v. American Federation of Television and Radio Artists*, 6 Cir., 285 F. 2d 902, 903. Our study of the record leaves us with a distinct impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner's credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the "employee attitude" the examiner so tenuously surmised was reflected by debit agents' off-the-stand demeanor.

Thus, in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or equivocal nature of the factors embraced in other findings, we are confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions.

The Company's petition to set aside the Board's order is granted, and, consequently, the Board's petition for enforcement of its order is denied.

Order set aside and enforcement denied.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT, CHICAGO, ILLINOIS 60604

Wednesday, December 21, 1966

Before Hon. WIN G. KNOCH, *Circuit Judge*, Hon.
LATHAM CASTLE, *Circuit Judge*, Hon. LUTHER M.
SWYGERT, *Circuit Judge*.

No. 15266

UNITED INSURANCE COMPANY OF AMERICA, PETITIONER
vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, INTERVENOR

No. 15589

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, PETITIONER
vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
UNITED INSURANCE COMPANY OF AMERICA, INTERVENOR

PETITIONS TO REVIEW AND CROSS-PETITION TO ENFORCE AN
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

This cause came on to be heard on petitions to review an order of the National Labor Relations Board, the answer and cross-petition for enforcement of said order, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the Company's petition to set aside the order entered in this cause by, the National Labor Relations Board on July 28, 1965, be, and the same is hereby granted; and the Board's petition for enforcement of its order be, and the same is hereby denied, in accordance with the opinion of this Court filed this day.

APPENDIX B .

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

MAY 19 1967

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1410~~ 179

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED INSURANCE COMPANY OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

ISAAC N. GRONER
1730 K Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

ALAN Y. COLE
COLE and GRONER
1730 K Street, N.W.
Washington, D. C. 20006

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	11
Conclusion	18
Appendix A: Decisions of Court Below	1a
Appendix B: Statutory Provisions Involved	24a

CITATIONS

CASES:

Capital Life and Health Ins. Co. v. Bowers, 186 F. 2d 943 (4 Cir. 1951)	17
Hanna Mining v. Marine Engineers, 382 U.S. 181 (1965)	16
Insurance Agents' International Union, 119 NLRB 768 (1957), <i>reversed on other grounds</i> , 104 U.S. App. D.C. 218, 260 F. 2d 736 (1958), <i>affirmed</i> , 361 U.S. 477 (1960)	14
Insurance Workers International Union v. N.L.R.B., 360 F. 2d 823 (D.C. Cir. 1966)	18
John Hancock Mutual Life Insurance Company, 26 NLRB 1024 (1940)	15
Labor Board v. Hearst Publications, 322 U.S. 111 (1944)	16
Metropolitan Life Insurance Company, 156 NLRB 1408 (1966), <i>upon remand</i> , Metropolitan Life Ins. Co. v. Labor Board, 380 U.S. 438 (1965)	15
Metropolitan Life Insurance Company, 138 NLRB 512 (1962)	14
Metropolitan Life Insurance Company, 43 NLRB 962 (1942)	15
Quaker City Life Ins. Co., 134 NLRB 960 (1961), <i>enforced</i> , 319 F. 2d 690 (4 Cir. 1963)	15

The Western and Southern Life Insurance Company, 56 NLRB 859 (1944)	15
United Insurance Company of America v. N.L.R.B., 304 F. 2d 86 (7 Cir. 1962)	8
United Insurance Company of America, 162 NLRB No. 33 (1966)	18
United States v. Silk, 331 U.S. 704 (1947)	16-17
Universal Camera Corp. v. Labor Board, 340 U.S. 474 (1951)	16

STATUTES AND OTHER MATERIALS:

28 U.S.C. § 1254(1)	2
29 U.S.C. § 141 <i>et seq.</i>	2
BLS Employment and Earnings and Monthly Report on the Labor Force	15
Davis, M. E., "Modern Industrial Life Insurance," in D. McCahan, Life Insurance Trends at Mid-Cen- tury, 115 (University of Pennsylvania Press; 1950)	12
Hoffman, F. L., "Industrial Life Insurance," in H. P. Dunham, The Business of Insurance, vol. 1 (Ronald Press; 1912)	12
Lederer, R. W., Home Office and Field Agency Organi- zation-Life (Life Office Management Association; Rev. ed. 1966)	12
Taylor, M., The Social Cost of Industrial Insurance (Alfred A. Knopf; 1933)	12

IN THE
Supreme Court of the United States
OCTOBER TERM, 1966

No.

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED INSURANCE COMPANY OF AMERICA, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Petitioner, Insurance Workers International Union, AFL-CIO ("Union"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on December 21, 1966.¹

¹ The Solicitor General, on behalf of the Board, has filed a petition for a writ of certiorari seeking review of the same judgment. No. 1409, October Term, 1966.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board ("Board"), is printed in the Joint Appendix filed in the Court of Appeals, nine copies of which have filed with this Court, and is reported at 154 NLRB 38 (1965). The Opinion of the Court of Appeals, printed in Appendix A, *infra*, p. 1a, is reported at 371 F. 2d 316 (1966).

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1966. On May 20, 1967, Mr. Justice Clark signed an Order extending the time for the filing of this Petition to and including May 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); and that of the Court below, under 29 U.S.C. § 160.

QUESTION PRESENTED

Whether the Board may find workers to be "employees" rather than "independent contractors" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* ("Act") when many of the controls which management imposes upon them are inherent in the nature of the business and when their duties include collections and sales in the field so that they spend much of their working time outside the immediate physical supervision of the management.

STATUTORY PROVISIONS INVOLVED

The statutory provisions primarily involved are those of the Act. Pertinent excerpts from Sections 2(3), 7, 8(a)(1) and (5), and 10(e) and (f) of the Act are set forth in Appendix B, *infra*, p. 24a.

STATEMENT

This case presents significant questions as to the interpretation and scope of the exception of "an independent contractor" from the definition of an "employee" entitled to the protection and coverage of the Act (Section 2(3), set out *infra*, p. 24a), in the context of a refusal to bargain case. Subsequent to August 14, 1964, when the Board certified the Union as the appropriate bargaining unit of the debit² insurance agents employed by Respondent, United Insurance Company of America ("Company"), in its Districts in Baltimore City and Anne Arundel County, Maryland, the Company refused to bargain on the ground that these agents were "independent contractors" and not "employees" within the meaning of the Act; and the Board issued a Complaint charging the Company with violation of Sections 8(a)(1) and (5) of the Act, in sum refusal to bargain. The significant facts of record, using "facts" to denote the objective and particularized description of what agents and their supervisors have done, said or written, are not in dispute. There is no dispute of "facts" in that sense for present purposes, as between what the Board and the Trial Examiner found, on the one hand, and what the Court below found or assumed, on the other—although there are, of course, decisive disagreements as to the legal characterization and pertinence of particular facts, and as to the ultimate conclusion of whether these agents are employees or independent contractors. The pertinent facts may be summarized as follows.

² The word "debit" is generally used to signify either the group of policyholders whose premiums have been assigned to the particular agent for collection and servicing, or the geographic area within which the bulk of those policyholders is concentrated.

1. These agents are not on their own in the sense of being independent businessmen and having or operating their own businesses. They do not hold themselves out to the public as being independent contractors, or entrepreneurs. They have no business name or business legal status independent of the Company. They have made no capital investment and have no required overhead expenses to meet; by definition, therefore, they cannot make any "profit", using that term either as return on investment or as net excess of revenue over cost of doing independent business. The only risk confronting these agents is that they will lose their jobs with the Company; there is no other economic risk, no capital risk, which is characteristic of their work.

2. These agents spend most of their working time in the field, generally alone, removed from the immediate physical presence of management, within the confines of their debit, collecting premiums from the current policyholders of the Company and endeavoring to sell them and others new insurance. When a new agent is hired he is given a debit which includes already existing Company policyholders and prospects. These agents do not own their debit; an agent may not sell or assign or otherwise deal with the debit or any of the insurance business thereon as his own and when he leaves he must return it all to the Company. These agents did not select the debit system as the manner and means of carrying on this business; the Company did so unilaterally, as the best way of operating its debit insurance business.

3. These agents have no independent business office, address or telephone listing. They are assigned to a particular district office of the Company; and that

office encompasses the only business office space they use (they may have a work area or cubbyhole in their homes for which they may take a tax deduction) and the mailing address, office services, business telephone number, and forms and records which they use. They do not own or pay rent, salaries or any of the expenses of their district office. Nor did they select the district office system as the manner and means of carrying on this business; the Company did so unilaterally, as the best way of operating its debit insurance business.

4. Instead of being on their own, these agents constitute an integral and inseparable element in the Company's entire organization and administrative hierarchy and apparatus. Each of these agents is assigned not only to a particular district office, headed by a particular manager, but, in addition, to a particular staff, headed by a particular assistant manager. The number of agents assigned by the Company to each district and to each staff is small enough to insure a close relationship—intimate knowledge by management of what each agent is doing and how he is doing it. There are about twenty agents in each district. Each assistant manager has a staff of five agents. The Company decided unilaterally that five or six was the proper number for assistant managers to work with.

5. The Company subjects these agents to the direct physical presence of management officials, in two principal ways. One is the Company's requiring all agents to report to their district offices on a particular morning each week. When the agents report each week, they submit reports which management checks to determine how the agents are performing their work. The reports include both the financial or collection function; and the submission of applications for new

business. In both cases, management reviews the forms and directs that changes and corrections be made to their satisfaction. Further, the Company regularly assigns assistant managers and special writers, as their principal function, physically to accompany agents as the agents do their work on their debits.

6. The authority of these agents is limited and defined by the Company. The insurance policies which these agents sell are the Company's and the Company's alone; and the prices or premiums which shall be charged are determined by the Company. These agents have no title to the policies nor are they empowered to make "deals" to conclude individual sales.

7. These agents are not on their own in the sense of having any other means of a livelihood or any real bargaining power vis-a-vis the Company. They are full-time employees dependent on their jobs as agent for this Company for their livelihood. To become an agent, no experience, education or training is required. The Company provides whatever training it deems desirable for its own purposes, and not only for the new agents; the established agents also are subjected to Company training and exhortation, through the media of the weekly meeting and the physical accompaniment of agents on their debits.

8. The rates of compensation for these agents are determined unilaterally by the Company. The agents are not consulted and there is no negotiation between Company and agents. As to the mechanics of payment, while the agents remit only a net amount of money from their collections, the Company checks the reports and withholdings to insure that only the amount it considers correct has been withheld.

9. The relationship between these agents and the Company is not *ad hoc* or transitory. The Company makes length of service a factor in the computation of certain commissions, and pensions and other rights as well; and in general, encourages prolonged service by agents, in its own interest.

10. Agents are asked for their resignation—are fired, for all practical purposes—whenever the Company finds their performance inadequate. The record contains a letter from the Company advising approximately half of these agents as follows, “if any agent believes he has the power to make his own rules and plan of handling the company’s business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company’s plan, then the company will be forced to take the agent’s final.”³

Decision of Board

On May 13, 1965, the Trial Examiner issued his Decision, in essence finding these agents to be employees and concluding that the Company had violated the Act by refusing to bargain with the Union. On July 28, 1965, the Board issued its Decision and Order; it adopted the findings and conclusions of the Trial Examiner, with one qualification. The Board declared, “In adopting the Trial Examiner’s ultimate conclusion, we do not rely on his observation as set out in footnote 26 of his Decision that the demeanor of the debit agents toward admitted supervisors during the hearing was one indicating an employer-employee

³ Respondent’s Exhibit 29, Record before the NLRB, which has been lodged with the Clerk of this Court.

relationship.”⁴ In his footnote 26, the Trial Examiner had raised the question of whether off-stand demeanor was entitled to be considered. His doubt that such evidence could be considered was expressed in the text to which the footnote was appended. The entire matter was expressly dictum inasmuch as his preceding sentence referred to “the demeanor of the parties representatives and their witnesses, which I observed during the 8 days of hearing and which I cite in addition to the other and *themselves sufficient* bases for my findings.”⁵

Court of Appeals Decision

The Court of Appeals declared that these agents were independent contractors and not employees; and therefore reversed the Board and refused to enforce its Order. The Court relied upon its decision in a prior case, *United Insurance Company of America v. N.L.R.B.*, 304 F. 2d 86 (7 Cir. 1962), which is printed in Appendix A, *infra*, p. 16a. In both the instant decision and the former decision, the Court was much impressed that the Company desired that these agents be considered independent contractors, and also upon the statement that each agent is “on his own.”

Moreover, the Court derogated many of the factors upon which the Board relied, with the assertion that they were inherent in the nature of the business. For example, the Court swept to one side all the evidences of control which were admittedly supported by substantial evidence with the following observation: “They are not indicative of an existence or exercise of control

⁴ 154 NLRB at 38, n. 2.

⁵ *Id.* at 48 (emphasis added).

directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors."⁶ Likewise the Court disregarded the evidence that Company control was required for transfer on the ground that "Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent."⁷ Identically, the Court denied probative force to the evidence that the assistant managers accompany the agents and service the agents' debits when their agents are absent, upon its statement that:

"The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would, in the absence of corrective action require termination of the relationship in either case."⁸

⁶ Appendix A, p. 10a, *infra*, 371 F. 2d at 322.

⁷ *Id.* at 11a, 323.

⁸ *Id.* at 12a, 323.

Identically, the requirement that these agents report weekly to the office and attend sales meetings was thus asserted to be neutralized in legal effect:

“The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts.”⁹

In general, the Court, while adopting the rubric of the “substantial evidence” test—whether there is substantial evidence to *support* the Board’s findings—made clear that its review was in truth directed to finding factors “consistent with an independent contractor status”¹⁰—to searching for some plausible grounds for overturning the Board’s findings.

To muster further support for its unusual approach to judicial review of a Board decision, the Court went on to treat the Trial Examiner’s incidental dictum about off-stand demeanor as vitiating all the Board’s findings of fact. The Court actually held that the dictum, which the Trial Examiner had expressly declared he was not relying on and which the Board had expressly disavowed, revealed the record “undesignedly” to be “tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board’s determination and order.”¹¹

⁹ *Ibid.*

¹⁰ *Id.* at 10a, 322.

¹¹ *Id.* at 15a, 324.

REASONS FOR GRANTING THE WRIT

1. This case presents the question of general importance in the administration of the Act of whether debit insurance agents, and indeed all employees who work in the field on collections or sales functions, may be held by the National Labor Relations Board to be "employees" and thus subject to the protection of the Act. They cannot be, if the decision below is allowed to stand. For the grounds upon which the decision rests are not and cannot be confined to this particular employer or this particular record.

A. As the above Statement indicates, one of the express and fundamental grounds of the decision of the Court below, adverted to in instance after instance to derogate the items of control which the Board had found the Company exercised and reserved with respect to these agents, was that the particular controls were inherent in the nature of the business. By definition, then, the decision extends to the entire debit insurance industry, and, indeed, to all collection and sales activities where a Court of Appeals asserts that the inherent nature of the work requires the close controls demonstrated on the record and relied upon by the Board.

This Court should clarify the appropriate legal tests for determination of "employee" and "independent contractor" status for the purposes of the Act. Under appropriate legal standards, is the Board, and the Court of Appeals in reviewing the Board, permitted or obligated to accept each element of factual evidence of exercise or reservation of the right of control over the workers and the work as some evidence of employee status; or may the Board or the Court of Appeals dis-

characteristic of Respondent Company. Invariably, a debit insurance company requires the agent to make none of the investment and assume none of the capital risk, and to expend no money (other than for transportation to his place of work, an expense incident to most employment), in order to obtain or to hold his position as an agent. Invariably, the agent needs no particular experience or schooling to be employed; is given a debit when he is employed and may not take the business with him when he leaves; is not authorized to vary any of the policy or premium terms prescribed by the Company; and lacks the attributes of independent entrepreneurship.

Typical findings about debit insurance agents, made by the Board in legal contexts addressed to other issues than employee-independent contractor, demonstrate the close similarity between the debit agents' work, whatever the company, and the characteristics of the work of the agents involved in this case. As to the debit agents employed by The Prudential Insurance Company of America, for example, the Board found, "The employees here involved are insurance agents, not factory production workers. Their general duties are to sell and service insurance policies. No particular time or place for such employee services are required by the employer." *Insurance Agents' International Union*, 119 NLRB 768, 783 (1957), *reversed on other grounds*, 104 U.S. App. D.C. 218, 260 F.2d 736 (1958), *affirmed*, 361 U.S. 477 (1960). In *Metro-politan Life Insurance Company*, 138 NLRB 512, 514 (1962), also, the Board found, "Most of a debit agent's time is spent away from the office." The similarities among debit insurance agents are such that the Board has fashioned general principles of appropriate bar-

gaining unit determination applicable to such agents. *Metropolitan Life Insurance Company*, 156 NLRB 1408 (1966), upon remand, *Metropolitan Life Ins. Co. v. Labor Board*, 380 U.S. 438 (1965); *Quaker City Life Ins. Co.*, 134 NLRB 960 (1961), enforced, 319 F.2d 690 (4 Cir. 1963).

There can be little doubt that insurance companies will be alert to avail themselves of opportunities presented by the decision below to defeat or delay collective bargaining with representatives of debit insurance agents, with the defense of independent contractor. During earlier days, they raised the independent contractor defense until it appeared laid to rest. See, e.g., *Metropolitan Life Insurance Company*, 43 NLRB 962, 964-965 (1942); *John Hancock Mutual Life Insurance Company*, 26 NLRB 1024, 1033 (1940); *The Western and Southern Life Insurance Company*, 56 NLRB 859, 860-861, 872-883 (1944).

Accordingly, the rights of the 100,000 debit agents in this country¹³ under the Act will be impaired if not ultimately destroyed, if this Court should not review this decision. In addition, the rights under the Act of all employees whose principal duties are sales or collection in the field will be jeopardized. This case presents questions affecting the administration of the Act which are of general importance warranting consideration and elucidation by this Court.

¹³ This is the best estimate, on the basis of Union data and experience. There were 233,000 persons employed in the "Insurance agents, brokers, and services" industry in 1965, according to the *BLS Employment and Earnings and Monthly Report on the Labor Force*. We are advised there is no breakdown available of this figure.

regard any demonstration of control because either the Board or the Court regards that control necessary in the business or industry involved? Petitioner believes the provisions and purposes of the Act impel the conclusion that each evidence of the reservation or exercise of the right of control is evidence of employee status; and that a Court of Appeals may not neutralize and disregard such evidence and finding by the Board, as the Court below has done, on the ground that the controls are the result of the necessities of the business. Those necessities may explain the practical cause, but should not define the legal effect; of the controls reserved and exercised.

It may well be that the debit insurance industry, and likely all businesses which include substantial collections and sales work in the field, requires such extensive reservation of control by management over those doing the work as to make almost inevitable the legal conclusion that they are employees.¹² But to permit a Court of Appeals to exclude such evidence on that ground is tantamount to permitting it to decide whether a certain group of employees is entitled to the protection of the Act on the basis of the Court's own private preferences and prejudices, rather than the

¹² "A strict system of supervision is necessary in the industrial insurance field in order to make sure that each agent is performing his task properly." Maurice Taylor, *The Social Cost of Industrial Insurance*, 114 (Alfred A. Knopf; 1933); R.W. Lederer, *Home Office and Field Agency Organization-Life*, 235 (Life Office Management Association; rev. ed. 1966); M.E. Davis, "Modern Industrial Life Insurance," in David McCahan, *Life Insurance Trends in Mid-Century*, 115, 122 (University of Pennsylvania Press; 1950); F. L. Hoffman, "Industrial Life Insurance," in H. P. Dunham, *The Business of Insurance*, vol. 1, at 468 (Ronald Press; 1912).

objective evidence and the terms and policy of the statute as enacted by the Congress.

B. Further, the Court below was much persuaded by the concept that the agent is "on his own." It is not precisely clear what the Court means; this may be only a shorthand summary of the result of finding them to be independent contractors, and the phrase may thus bear no particularized denotation. Perhaps more likely, the Court below was relying upon two different aspects of the agents' work. One is that they may set their own hours of work (of course in relation to their clients' needs and availability)—with the exceptions, derogated by the Court as indicated above, of the required weekly reporting to the district office and management's scheduling of work in relation to its accompaniment of the agents on their debits. Or the Court may have been referring to the fact that the agent spends most of his working time on his debit, physically removed from the immediate presence of his supervisor. Whatever the Court meant, the circumstances of this work which it had in mind are patently not unique to these agents, but are characteristic of debit insurance agents in general.

Furthermore, the other attributes of this relationship which the Court recited in its opinion are typical of the relationship between the debit insurance agents and their companies generally. In general throughout the debit insurance industry, the unit of administration and organization of the agents' work is the district office, supervised by a manager who is assisted by a number of assistant managers. There would be no company in which the number of agents assigned to an assistant manager is smaller than the five which is

2. The decision below is in conflict with pertinent decisions of this Court. The decision below did not in fact accord to the Board that full measure of judicial deference to the Board's finding of fact and its expertise in the field of industrial relations which has been prescribed by this Court, both in general, *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951), and in particular with regard to the employee-independent contractor issue, *Labor Board v. Hearst Publications*, 322 U.S. 111 (1944). It remains true, as this Court declared in the latter case but the Court below transparently overlooked, that the term "employee" as used in the Act, "like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship."¹⁴ This Court has recently adverted to the special expertise of the Board in applying the statutory terms of the Act. *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 190 (1965). While the opinion of the Court below includes general discussion, as if by rote, of the *Universal Camera* principle, an informed analysis of the decision reveals that it in fact accorded no weight, or egregiously inadequate weight, to the findings of fact made and relied upon by the Board.

Similarly, the Court below manifestly disregarded the holding and rationale of this Court, in *United States v. Silk*, 331 U.S. 704, 719 (1947):

"* * * where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks.

¹⁴ 322 U.S. at 129.

They hire their own helpers. * * * It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.”

Upon the facts of this case, as recited by the Court below as well as the Board, these agents have no responsibility for investment or management; they are not small businessmen; they own no capital assets or tangible resources; they hire no helpers; they undertake no economic risk (except that of losing their jobs); they exercise no control over the fundamental manner and means of performing this work, such as the debit system itself, the district office organization for carrying on the business, the timing and contents of the reports required and the scope and price of the services offered; they have no opportunity for profit. They are obviously not independent contractors, within any legitimate range for judicial review of the Board’s findings.

Furthermore, the decision below cannot be reconciled with *Capital Life and Health Ins. Co. v. Bowers*, 186 F. 2d 943, 945 (4 Cir. 1951), where the Court had the following to say with respect to the debit insurance business and the employee status (for purposes of the Social Security Act as it stood in 1948) of debit insurance agents: “Long experience of the taxpayer and other companies in this field has resulted in the adoption of methods and forms best suited to the business which leave little discretion to the agents * * *”¹⁵

¹⁵ There would appear to be no practical possibility of conflict among the circuits as to the status of the debit insurance agents of the Company. In the instant case, the Union filed a petition for review with the District of Columbia circuit, prior to the time that

The clarification of the application of the "independent contractor" exception is an issue of general importance in the administration of the Act. This case is an appropriate vehicle for the Court to consider and discuss that important issue.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ISAAC N. GRONER
1730 K Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

ALAN Y. COLE
COLE and GRONER
1730 K Street, N.W.
Washington, D. C. 20006

the Company filed its petition for review with the Seventh Circuit; but the Company made a motion to transfer the case, which was granted. *Insurance Workers International Union v. N.L.R.B.*, 360 F. 2d 823 (D.C. Cir. 1966). Subsequently, in a case involving a bargaining unit of debit insurance agents of the Company in the Commonwealth of Pennsylvania, the Board made a finding that they were employees. *United Insurance Company of America*, 162 NLRB No. 33 (1966). Again, the Union filed the earlier petition for review, with the Third Circuit, and the Company made a motion to transfer to the Seventh Circuit; and we have been advised by the Office of the Clerk of the Third Circuit that the motion has been granted.

APPENDIX A

Decisions of Court Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966—SEPTEMBER SESSION, 1966
Nos. 15266 & 15589

No. 15266

UNITED INSURANCE COMPANY OF AMERICA, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Intervenor.

No. 15589

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

and

UNITED INSURANCE COMPANY OF AMERICA, *Intervenor.*

On Petitions to Review and on Cross-petition to Enforce
an Order of the National Labor Relations Board.

December 21, 1966

Before KNOCH, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* These cases are before the Court
upon the petition of United Insurance Company of America

(Company) to review and set aside an order of the National Labor Relations Board issued against the Company July 28, 1965, a petition of Insurance Workers International Union, AFL-CIO, (Union) to review the Board's order to the extent the order denied the Union the full relief it requested, and upon the cross-petition of the Board to enforce its order.¹ A motion of the Company to dismiss the Union's petition was taken with the case on the merits.

The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by its admitted refusal to bargain with the Union, the certified representative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland.

The Company is engaged primarily in selling industrial life insurance, a form of ordinary life insurance in which the policies are written in amounts of less than \$1,000 and the premiums are payable weekly, and for that purpose maintains district offices throughout the country. Each district office has a manager and several assistant managers, and each assistant manager heads a group of four or five debit agents. These debit agents, so-called for the reason that "debit" describes the agent's book listing the policyholders from whom the agent collects premiums, spend most of their time in the collection of premiums from policyholders residing in a given area. They also solicit applications for new insurance and for fire insurance written by another insurer whose business is also handled by the management and supervisors of the Company.

On June 4, 1964, the Union filed a petition with the Board seeking certification as the collective bargaining repre-

¹ The Union's petition was originally filed in the United States Court of Appeals for the District of Columbia Circuit. The Company thereafter filed its petition with this Court and it was transferred to the District of Columbia Circuit as provided by 28 U.S.C.A. § 2112(a). The Board cross-petitioned for enforcement of its order, and the D. C. Circuit transferred the proceedings to this Court where they were consolidated for hearing and disposition.

sentative of the Company's debit agents in Baltimore City and Anne Arundel County, Maryland. On March 16, 1964, the Company had entered into a reinsurance agreement with Quaker City Life Insurance Company, a Philadelphia, Pennsylvania corporation, under which, among other things not here pertinent, the Company reinsured the industrial life insurance policies issued by Quaker in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland. Quaker had chosen to maintain an employer-employee relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County were represented by the Union. Upon the effective date of the reinsurance agreement (March 16, 1964) Quaker terminated all of its employees. Some of Quaker's former agents in Baltimore City and Anne Arundel County became agents of the Company. The policies they serviced, and the business they generated, were handled from the Company's Franklin Street district office in Baltimore, a location formerly utilized by Quaker. The debit agents here involved were about equally divided between that office and the company's St. Paul Street district office from which the Company had handled its policies in Baltimore prior to its reinsurance of Quaker's policies and continued to maintain.

On July 6, 1964, the Company and the Union entered into a stipulation for certification upon consent election which by its terms provided that the Company did not waive its contention that the debit agents in the unit were independent contractors and not employees within the meaning of the Act, and that the failure of the Company to contest that issue was limited solely to the representation proceeding. The Union won the election and was certified on August 14, 1964. On August 20, 1964, the Union requested recognition. On September 1, 1964, the Company denied that request. It based its refusal to bargain with the Union on the ground that the debit agents involved are independent contractors and not employees.

The Board ordered the Company to cease and desist from its refusal to bargain, to bargain with the Union upon request, and to post designated notices.

The Board's conclusion that the Company violated Section 8(a)(5) and (1) of the Act is predicated upon the Trial Examiner's findings and conclusions to the effect that the Company's debit agents in the Baltimore City and Anne Arundel County area unit here involved are employees within the meaning of the Act, which findings and conclusions the Board adopted.

The Company contends that the Board's order is not supported by substantial evidence on the record considered as a whole; that the findings and conclusions adopted by the Board are, in material part, the product of subjective conclusions drawn from the trial examiner's personal observations rather than from the evidence; that material comparative testimony, proffered by the Company, was erroneously excluded; and that at the most the testimony of the two witnesses credited and relied upon by the examiner can be regarded as establishing only that the unit was half "employee" and half "independent contractor".

The Union's contentions² are limited to its assertions that the Board erred in denying its requests that there be included in the Board's order a specific direction that the Company bargain concerning the fire insurance aspects of the debit agents' activities and a requirement that the Company, from the date of its refusal to bargain until the discharge of its bargaining obligations, apply to all of the debit agents in the unit the terms of a contract which allegedly had existed between Quaker and its former debit agents; and that the Union is entitled to challenge these aspects of the Board's order as a "person aggrieved". The Company's motion to dismiss the Union's petition in

² Except for those contentions urged by the Union as intervenor in No. 15266 in support of the Board's order.

No. 15589 challenged the Union's status as an aggrieved person. The Board takes the position that while the Union is an aggrieved person in so far as jurisdictional purposes are concerned, and therefore this Court has jurisdiction of the Union's petition for review, the contentions of the Union with respect to the scope of the Board's order are wholly without merit.³

Two years prior to the Union's petition for certification in the instant matter the issue whether the Company's debit agents in Pennsylvania were Company employees or independent contractors was before this Court in *United Insurance Company of America v. N.L.R.B.*, 7 Cir., 304 F. 2d 86. This Court there observed:

"In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do."

And citing *N.L.R.B. v. Phoenix Mutual Life Insurance Company*, 7 Cir., 167 F. 2d 983, and *National Van Lines*,

³ In view of our conclusion that the Board's order is not entitled to enforcement the Union's petition in No. 15589, and the Company's motion to dismiss that petition, are moot. Accordingly, we will not discuss the contentions of the parties with respect thereto. Suffice it to indicate that we agree with Board's position that the Union was entitled to petition for review of the Board's order insofar as it denied the additional relief the Union requested but that there is no merit to the Union's complaints. There was no necessity for a specific reference to the fire insurance activities. Bargaining orders need not specify each individual matter upon which an employer must bargain, particularly where, as here, the threshold question is whether there is an obligation to bargain. Cf. *San Antonio Machine & Supply Corp. v. N.L.R.B.*, 5 Cir., 363 F. 2d 633, 642. And, there is no basis in the record, either factually or legally, to support the Union's request concerning interim application of an alleged contract.

Inc. v. N.L.R.B., 7 Cir., 273 F. 2d 402, the Court pointed out (304 F. 2d 89):

"... that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. . . . the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. In determining whether the requisite control of manner or means is present, various tests have been employed."

but

"The conclusion must be based on the 'total situation' looking at all of the facts in the particular case."

The Court held (304 F. 2d 90):

"... the debit agents are independent contractors. A debit agent is 'on his own'. He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. As admitted by the trial examiner, the agent pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. Agents may transfer policies among themselves and are not required to do so by United. An agent retains his own commission from collected premiums. As to selling insurance, the agent * * * is free to follow the superintendent's suggestion or to devise his own methods.' "

The Court rejected as insignificant the factors relied upon by the Board in support of its conclusion that the agents were employees, and in this connection the Court observed:

"Suffice it to say, we have carefully considered each of the items and categories mentioned, but we are convinced they do not show, in connection with all the other facts and circumstances, that an employer-employee relationship existed.

There are many businesses, and the sale of insurance is one of them, where the management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose 'tools' are their own initiative and personality and who work on their own time and at their own expense. However, some insurance companies have established an employer-employee relationship such as the company in *N.L.R.B. v. Phoenix Mutual Life Insurance Company*, [167 F. 2d 983] *supra*."

With the critical test firmly established by *United Insurance Company of America v. N.L.R.B.*, 7 Cir., 304 F. 2d 86, and the decisions cited therein, and the nature of the various factors which may properly be considered in applying that test illustrated by that decision, we turn to an appraisal of the record before us giving full recognition to the fact that the issue presented is to be determined on the record in this particular case. *National Van Lines, Inc. v. N.L.R.B.*, 7 Cir., 273 F. 2d 402, 407.

Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera*

(340 U.S. p. 489) as affording "[s]ome scope for judicial discretion" and approved with the express realization that "[t]here are no talismanic words that can avoid the process of judgment", and the admonitions (340 U.S. 488 and 496) that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight" and that the examiner's findings are not to be "given more weight than in reason and in the light of judicial experience they deserve" and "are to be considered along with the consistency and inherent probability of testimony". And *Universal Camera* makes it clear (p. 488) that:

"[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

And in this connection *Eastern Greyhound Lines v. N.L.R.B.*, 6 Cir., 337 F. 2d 84, reiterates the pertinent observation made in *N.L.R.B. v. Elias Bros. Big Boy, Inc.*, 327 F. 2d 421, 426, after a review of the relevant cases, that:

"In a proper case [the reviewing court] may decline to follow the action of an examiner in crediting and discrediting testimony, even though the Board has adopted the Examiner's findings."

Similarly, in *Portable Electric Tools, Inc. v. N.L.R.B.*, 7 Cir., 309 F. 2d 423, 426, this Court had occasion to state:

"While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be

given when evaluating the evidence on the record as a whole."

and that if the Court is not to be "merely the judicial echo of the Board's conclusion" a Board determination must be set aside when the record clearly precludes that determination from being justified by a fair estimate of the worth of the testimony of witnesses or the Board's informed judgment on matters within its special competence or both.

The trial examiner's decision discusses testimony and exhibits of record bearing on various factors relevant to, and to which the examiner attached significance in, the determination of the debit agents' status as employees or independent contractors. These factors embrace most of those mentioned in our opinion in the earlier case involving the Company's Pennsylvania debit agents (*United Insurance Company of America v. N.L.R.B.*, 7 Cir., 304 F. 2d 86). But, on the record in the instant proceeding, the examiner, although professing that he was not overlooking the Company's testimony that in order to meet or avoid the Board's earlier findings (set aside in *United Insurance, supra*) it had advertently set about to and had made changes, including revisions in the manual the Company furnishes its debit agents, to more clearly reflect the independent contractor status; and while finding that the Company does not fix the agent's hours for debit collections and other services on his debit, and that the agent is permitted to retain his commission from the premiums collected, proceeded to find that the testimony concerning certain of the Company's requirements and practices evidenced such right of control as dictated a conclusion that the agents are employees.

In this latter connection the examiner found that (1) the agent is required to make a weekly report and settlement of account at his district office in the morning of a

designated day, use forms specified and furnished by the Company, and comply with its accounting procedures; (2) on the day he so reports there usually is a sales meeting with the district manager which the agent is required to attend, followed by group and individual meetings and discussions between the agents and the assistant manager to whom each agent is assigned; (3) the agent receives assistance from and is subject to supervision by the assistant manager to whom he is assigned; (4) transfers of policyholders between agents are subject to Company approval; and (5) the Company pays travel expenses, provides rent, postage, and telephone, as well as office space in its district office for the agent's use when he comes in to make his weekly report and accounting, and to pick up mail and telephone messages.

We find no support in the record for some of these findings and but tenuous support for others. Those which are supported by substantial evidence are, in our opinion, consistent with an independent contractor status. They are not indicative of an existence or exercise of control directed to the "manner and means" by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carrier on through debit agents who are employees or who are independent contractors.

There is lack of evidentiary support for the examiner's findings that the Company pays travel expenses and furnishes rent, postage and telephone. In this respect the record merely discloses that where the policyholders making up an agent's debit are dispersed over a large area his commission is 1% more than the normal rate. There is no payment of the agent's actual travel expenses. The record does not establish that the Company furnishes or reimburses the agent for postage. It shows only that if

a policyholder mails a premium to the district office together with his premium receipt book the Company mails the book back to the policyholder at its own expense. With respect to "rent", "telephone" and the furnishing of "office space" the record divulges only that during the three or four hours a week the agent spends in the district office of the Company, usually on the morning when he makes his weekly report and accounting, tables and chairs are made available in the district office which the agent may use while preparing his report. Likewise, the agent may occasionally use the Company telephone while he is in the district office or receive a telephoned message which has been left for him.

There is testimony that where a policyholder moves from the area serviced by the debit agent or the agent secures a new policyholder outside of the area normally serviced by him⁴ he may arrange, subject to Company approval, with the agent who does serve the area involved for a transfer of the policyholder to the latter. There is other testimony that transfers are freely made between agents without first securing Company approval. In any event, it is our opinion that this transfer of business factor is not of critical significance. Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent.

There is testimony, some of which is not harmonious, concerning the "assistance" furnished and "supervision" exercised by the Company assistant managers, each of whom is assigned a group of four or five debit agents. Thus, while it appears that the assistant manager's association with the debit agent continues after the agent's initial training period, and the assistant manager may determine

⁴ Each agent has a state-wide license to solicit insurance and is not restricted by the Company in obtaining new business.

if and when he elects to accompany the agent on his rounds in the servicing of his debit, there is also testimony that the primary purpose for so doing is to assist the agent in the conservation of business—the calling on policyholders in connection with lapsed policies—and aiding the agent in procuring new business on which the latter receives the commissions. The assistant manager reviews the agent's reports, requires him to make necessary changes if the accounting is not correct, and cautions the agent about poor production when necessary. During periods of an agent's absence from his debit for a week or more because of illness, or while taking a vacation, the assistant manager, if available, will take over for the agent. Thus, while the assistant manager assists the agent and "supervises" the agent in the latter's relationship with and accounting to the Company it is hardly a supervision which entails the control of the "manner and means" as distinguished from the results the agent is required to obtain. The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case.

The testimony concerning attendance of sales meetings and with respect to discussion conferences with the assistant manager on the occasions of the weekly reports to the district office if appraised as evidencing Company insistence upon such attendance is, nevertheless, equivocal. The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts.

The trial examiner's appraisal of the testimony upon which his findings relating to the above factors were predicated was made on the basis of a credibility resolution that the General Counsel's chief witness, Ronney E. Scott, former employee-debit agent of Quaker and the chairman of the Union's local, whose display of "evident partisanship" was recognized, "was a reliable witness" and "I credit his testimony generally" as contrasted to what the examiner characterized as "the patently unreliable aspects" displayed by the Company's witnesses.⁵

And the appraisal of the testimony so made by the trial examiner, and the resulting findings he made from the testimony he credited, were accompanied by and made in the context of his observation that:

"To the extent if any that I may rely on demeanor in the hearing room, I would now report that without exception the agents did not display or appear to have attributes of independence (not even when the 'ring-leader' appeared to assert himself as he testified), but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard."

and of his reasoning, set forth in a footnote, that:

"... there appears to be no good reason for excluding demeanor in the courtroom when the witness is not on the stand and where it is clearly observable as in

⁵ The General Counsel presented the testimony of two witnesses, Scott and Don Ramon Jenkins, both of whom were members of the Union and had been employee-debit agents of Quaker before becoming agents for the Company. Jenkin's comparatively abbreviated testimony supported that of Scott in some particulars. The Company presented the testimony of four of the debit agents, and it was stipulated that the testimony of six others, identified for the record, would be of the same general tenor as that of the four who testified. Additional Company witnesses included its vice-president and general counsel, its agency vice-president, and the district manager, who was formerly a Quaker manager.

this case; . . . * * * Without attempting to detail the basis for this necessarily subjective finding, and allowing for an independent contractor's possible concern over renewal or termination of his contract, I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which, in such uniformity differs from the normally observable attitudes between independent contracting parties."

A witness' demeanor as a criterion of credibility is generally related to a witness' manner while on the stand or manner of testifying. And although the off-the-stand appearance or conduct of the witness may properly be considered in determining his credibility when it constitutes an observable physical fact, the off-the-stand demeanor here relied upon by the examiner was not based on his observation of a simple physical fact but was predicated upon such subtle manifestations of human reactions as "obsequiousness" and "courtesy" to which the examiner applied his own view or predilection as to what attitudes are "characteristic" of relationships between employers and employees and between independent contracting parties. In our opinion resort to conclusions drawn from the application of such an elusive subjective standard as the examiner here puts forth is improper and that conclusions so drawn do not afford an acceptable basis for a credibility appraisal much less can they supply any independent evidentiary content. *Kovacs v. Szentes*, 130 Conn. 229, 33 A. 2d 124.

In adopting the trial examiner's findings, conclusions, and recommendations the Board specifically disavows reliance upon the demeanor "observation" made by the examiner. But we do not perceive how this disavowal

can serve to remove from the examiner's findings and conclusions the flavor with which his demeanor observation tainted them. Cf. *Wheeler v. N.L.R.B.*, D.C. Cir., 314 F. 2d 260, 263; *N.L.R.B. v. American Federation of Television and Radio Artists*, 6 Cir., 285 F. 2d 902, 903. Our study of the record leaves us with a distinctive impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner's credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the "employee attitude" the examiner so tenuously surmised was reflected by debit agents' off-the-stand demeanor.

Thus, in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or equivocal nature of the factors embraced in other findings, we are confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions.

The Company's petition to set aside the Board's order is granted, and, consequently, the Board's petition for enforcement of its order is denied.

ORDER SET ASIDE

AND ENFORCEMENT DENIED.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit.

UNITED INSURANCE COMPANY OF AMERICA, a corporation,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 13500

United States Court of Appeals
Seventh Circuit

June 12, 1962

As Amended July 2, 1962

Before DUFFY, KNOCH and CASTLE, Circuit Judges.

DUFFY, Circuit Judge.

Petitioner (United) seeks to review a decision and order of the National Labor Relations Board (Board) dated August 10, 1961. The Board has filed a cross-petition for enforcement of that order.

This case is here for the second time. On the first occasion, we set aside the Board's order (272 F. 2d 446), holding the Board had not afforded United procedural due process. We remanded the case "for a full hearing and decision based upon a consideration of all relevant evidence."

The decision and order of the Board here challenged requires United to bargain collectively with Insurance Workers' International Union, AFL-CIO, (IWIU) as the collective bargaining agent for the licensed debit agents who serve United in the State of Pennsylvania. The principal issue is whether these licensed debit agents are independent contractors or employees of United.

In 1953, Local 5, Insurance Workers of America, CIO, filed a petition for certification with the Board. About one month later, Insurance Agents' International Union, AFL,

filed a petition also seeking certification. These petitions were later voluntarily dismissed and withdrawn respectively. About two and a half years later, Insurance Agents' International Union, AFL-CIO, petitioned for certification. An agreement was entered into by this Union and United for a consent election with the specific understanding that United would not waive its position that the debit agents were independent contractors.

An election and a re-run election were held, and the Insurance Agents' International Union, AFL-CIO, won and was certified. United refused to bargain, claiming that it was under no obligation to bargain with the Union because the debit agents were not its employees but were independent contractors.

United issues commercial and industrial life, health and accident, and hospitalization insurance policies. Under Pennsylvania law, Industrial Life Insurance Policies of less than \$1000 are sold on a weekly premium basis. The debit agents are engaged primarily in selling and collecting premiums on industrial life insurance policies issued by United. However, at times, they do collect premiums on other types of insurance policies issued by United.

In our previous opinion, we observed that in many respects a debit agent has the attributes of an independent contractor, and we listed some of them. We also said that there are some aspects of the duties of debit agents which might indicate their status is that of employees of United. In view of our disposition of the first appeal, we did not reach the issue of whether the licensed debit agents are independent contractors or employees.

On February 8, 1960, the Board reopened the record and remanded the case to the trial examiner "for the purpose of receiving additional evidence consistent with the Court's remand." A hearing was scheduled.

Prior to the hearing date, United moved to transfer the proceedings to the representation docket, principally on

the ground that three years had elapsed since the Insurance Agents' International Union (IAIU) had been certified in a close election. United claimed that the disposition of the matter in a representative proceeding would be appropriate to determine both the jurisdictional employee status issue and the current representative status of the certified Union. The motion was referred to the trial examiner and was denied.

On March 25, 1960, three days before the scheduled hearing, counsel who had represented Insurance Agents' International Union disclosed to United's counsel that the certified Union was no longer in existence. It was finally disclosed that in early 1959, prior to the time this case was first presented to this Court, the Insurance Agents' International Union had merged with the Insurance Workers of America and a new union had been formed known as the Insurance Workers' International Union, AFL-CIO, (IWIU). United then renewed its effort to have the case transferred to the representation docket. The Board denied United's request for leave to appeal the examiner's ruling denying the motion to transfer.

In the 1957 hearing, the Board declined to receive or consider the testimony of one Jack Borman which was offered by United. Counsel for United then made an extensive offer of proof. Borman operates a large enterprise which sells and services insurance policies for United in Pennsylvania. It has acted in such capacity for a considerable period of time. It is and has been subject substantially to the same instructions, report requirements and other procedures in its relationship with United as are the debit agents involved in this proceeding. The purpose of the testimony was to demonstrate that the so-called "controls" relied upon by the Board as showing the agents to be employees, applied equally to the Borman enterprise, which no one contended made them employees of United.

At the new hearing, there was no new evidence on the basic question of employee status. The parties stipulated

that the record in the prior proceeding should be considered a part of the record in the current proceeding. United again offered the testimony of Mr. Jack Borman, but it was again excluded by the examiner on the same basis as in the prior proceeding. The parties stipulated that if the Board found the exclusion of Borman's testimony to be error, United's offer of proof would be accepted as the entire testimony of Mr. Borman.

In his Supplemental Intermediate Report of July 29, 1960, the trial examiner recommended the Board dismiss the complaint against United because the certified Union which had filed the complaint in 1957 no longer existed, and that IWIU which purported to replace IAIU was not a certified representative of United's debit agents in Pennsylvania.

On September 28, 1960, the Regional Director issued a decision and order amending the 1957 certification by substituting IWIU for IAIU. United's request for leave to appeal this order was denied. On December 6, 1960, the Board issued a decision and order granting IAIU's motion to amend the name of the charging party to IWPU.

On March 24, 1961, the trial examiner filed a Second Supplemental Intermediate Report concluding that United's debit agents were employees, and recommended the Board reissue the order originally issued in this case on January 14, 1959, except that the Insurance Workers' International Union, AFL-CIO, should be substituted for Insurance Agents' International Union, AFL-CIO. On August 10, 1961, the Board adopted the trial examiner's findings, conclusions and recommendations.

In 1947, Congress amended the National Labor Relations Act so as to prohibit the National Labor Relations Board from assuming jurisdiction over independent contractors.¹

¹ Sec. 2(3), 29 U.S.C.A. § 152(3).

It is conceded the amendment was intended by Congress to nullify the Supreme Court ruling in *N. L. R. B. v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170.²

In *National Van Lines, Inc. v. N.L.R.B.*, 7 Cir., 273 F. 2d 402, 404-405, we quoted from a previous decision of this Court, *N. L. R. B. v. Phoenix Mutual Life Insurance Company*, 7 Cir., 167 F. 2d 983, at 986: “* * * This court there pointed out that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * *”

Thus, since 1947, the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. In determining whether the requisite control of manner or means is present, various tests have been employed.

Consideration is given to such items as the right to hire and discharge; the method of payment; who furnishes the tools and materials used; who designates the time and place for the work to be done; and the intention of the

² See *N. L. R. B. v. Steinberg, et al.*, 5 Cir., 182 F. 2d 850, 854-855, which discussed the legislative purpose. The House Committee Report reads, in part, as follows: “An ‘employee’, according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.*, 1944, 322 U.S. 111 [64 S. Ct. 851, 88 L. Ed. 1170], the Board expanded the definition of the term ‘employee’ beyond anything it had ever included before, and the Supreme Court relying on the theoretical ‘expertness’ of the Board, upheld the Board. * * *”

parties. Usually, no one of these categories is decisive. The conclusion must be based on the "total situation" looking at all of the facts in the particular case. *National Van Lines v. N. L. R. B.*, 7 Cir., 273 F. 2d 402, 407.

We hold the debit agents are independent contractors. A debit agent is "on his own." He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. As admitted by the trial examiner, the agent pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. Agents may transfer policies among themselves and are not required to do so by United. An agent retains his own commission from collected premiums. As to selling insurance, the agent " * * * is free to follow the superintendent's suggestion or to devise his own methods."

The examiner listed certain categories which he said indicate the relationship of employer and employee existed. He considered significant that each agent was assigned to the staff of a particular superintendent, and that certain reports are made by the agents.

When United needs a new agent, he is given a debit within the territory of a particular office. To the extent permitted by insurance laws, an agent is free to choose any of these centers and usually selects one which is geographically convenient although other factors may be significant to him. But no agent may be transferred except at his own request, and he may sell and service policies anywhere in the state.

There is nothing under this heading which shows United has taken from the agent his freedom of choice of manner and means. The reports mentioned by the examiner are no more significant than would be the situation where a manufacturer requires reports from its manufacturers' representative.

Another reason listed by the examiner for his conclusion is his claim that United assists its agents in their functions; that superintendents accompany new agents on their rounds and that sales meetings are held.

United does offer assistance to its agents but only to those who desire to receive same. Sales meetings are conducted but attendance is entirely voluntary. Some agents never attend such meetings. We think there is nothing in such practices inconsistent with an independent contractor relationship.

The examiner thought it significant that United makes group insurance plans available to groups of persons including its agents. Here the agents pay the full cost of the plan. Many organizations provide group insurance plans. The American Bar Association has a group insurance plan, but it is obvious that because there of, the relationship between the ABA and its members does not thereby become one of employer and employee.

The examiner relied upon the fact that rate manuals were owned by United. We think this is of no significance. Rate manuals in the insurance business are like a price list. A salesman must know the price of what he sells.

The examiner discussed other reasons and categories. It would unduly extend this opinion to discuss each in detail. Suffice it to say, we have carefully considered each of the items and categories mentioned, but we are convinced they do not show, in connection with all the other facts and circumstances, that an employer-employee relationship existed.

There are many businesses, and the sale of insurance is one of them, where management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose "tools" are their own initiative and personality and who work on their own time

and at their own expense. However, some insurance companies have established an employer-employee relationship such as the company in *N. L. R. B. v. Phoenix Mutual Life Insurance Company*, *supra*.

In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do.

Other questions have been argued by the petitioner and the Board. However, as we have decided the fundamental and underlying question in this case, a decision on the other points need not be reached.

The petition for review is granted, and the cross-petition for enforcement of the order is denied.

APPENDIX B**Statutory Provisions Involved**

National Labor Relations Act, as amended, 29 U.S.C. §§ 141 et seq.:

Section 2.(3), 29 U.S.C. § 152(3)

Sec. 2. When used in this Act— * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act; as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7, 29 U.S.C. § 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8.(a)(1)(5), 29 U.S.C. § 158(a)(1)(5)

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 10.(e)(f), 29 U.S.C. § 160(e)(f)

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole

shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing

of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

LIBRARY

SUPREME COURT, U. S.

JUN 19 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966.

No. **409** 178

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA
and
INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, Respondents.

No. **409** 179

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
UNITED INSURANCE COMPANY OF AMERICA,
Respondents.

On Petitions for Writs of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

**BRIEF FOR RESPONDENT UNITED INSURANCE
COMPANY OF AMERICA IN OPPOSITION.**

SCHNADER, HARRISON, SEGAL
& LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102

TESCHKE, BURNS, MALONEY
& MCGUINN,
One East Wacker Drive,
Chicago, Illinois. 60601

Of Counsel.

BERNARD G. SEGAL,
IRVING R. SEGAL,
HERBERT G. KEENE, JR.,
*Counsel for Respondent,
United Insurance Com-
pany of America.*

INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
1. Background	3
2. Facts	5
3. Decisions	12
ARGUMENT	14
CONCLUSION	21

TABLE OF CITATIONS.

Cases:	Page
Capital Life and Health Ins. Co. v. Bowers, 186 F. 2d 943 (C. A. 4, 1951)	20
Minnesota Milk Company v. N. L. R. B., 314 F. 2d 761 (C. A. 8, 1963)	14
N. L. R. B. v. A. S. Abell Company, 327 F. 2d 1 (C. A. 4, 1964)	14
N. L. R. B. v. Lindsay Newspapers, Inc., 315 F. 2d 709 (C. A. 5, 1963)	14
N. L. R. B. v. Nu-Car Carriers, 189 F. 2d 756 (C. A. 3, 1951)	14
N. L. R. B. v. Phoenix Mutual Life Insurance Company, 167 F. 2d 983 (C. A. 7, 1948)	14, 21
National Van Lines, Inc. v. N. L. R. B., 273 F. 2d 402 (C. A. 7, 1960)	14
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951)	17, 19
United Insurance Company of America v. N. L. R. B., 272 F. 2d 446 (C. A. 7, 1959)	3
United Insurance Company of America v. N. L. R. B., 304 F. 2d 86 (C. A. 7, 1962)	3
Statutes:	
National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 141 et seq.:	
Section 2(3)	2, 3, 5, 12, 13, 17, 20
Section 8(a)(1) and (5)	5
28 U. S. C. § 1254(1)	2
Ann. Code of Md.:	
Art. 48A, § 166a	6
Art. 48A, § 167	6
Art. 48A, § 387	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1409.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA

AND

INSURANCE WORKERS INTERNATIONAL
UNION, AFL-CIO,
Respondents.

No. 1410.

INSURANCE WORKERS INTERNATIONAL
UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

AND

UNITED INSURANCE COMPANY OF AMERICA,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**BRIEF FOR RESPONDENT UNITED INSURANCE
COMPANY OF AMERICA IN OPPOSITION.**

OPINIONS BELOW.

The opinion of the Court of Appeals (Pet. App. in No. 1409, pp. 17-33; Pet. App. in No. 1410, pp. 1a-15a) is reported at 371 F. 2d 316 (1966). The decision and order of the National Labor Relations Board (J. A. 1122-1183, 1199-1200) ¹ are reported at 154 N. L. R. B. 38 (1965).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 21, 1966. On March 21, 1967, Mr. Justice Clark extended the time for filing petitions for writs of certiorari to and including May 20, 1967. Both the petition for a writ of certiorari in No. 1409 and the petition for a writ of certiorari in No. 1410 were filed on May 19, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Court of Appeals, in the proper exercise of its power of judicial review, correctly applied to the "debit agents" of United Insurance Company of America in Baltimore City and Anne Arundel County, Maryland, the common law distinction between "employee" and "independent contractor", embodied in Section 2(3) of the National Labor Relations Act, as amended, 29 U. S. C. § 141 *et seq.*

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 141 *et seq.*), are set forth in the petitions (Pet. App. in No. 1409, pp. 35-36; Pet. App. in No. 1410, pp. 24a-27a).

1. "J. A." refers to the Joint Appendix filed in the Court of Appeals.

STATEMENT.

1. Background. United Insurance Company of America ("United") is an Illinois corporation engaged in the writing and sale of commercial and industrial life, health and accident, and hospitalization insurance policies. United's insurance policies are sold and serviced by independent agents known as "debit agents". Since July, 1953, Insurance Workers International Union, AFL-CIO (the "Union") has sought to represent various units of United's debit agents for purposes of collective bargaining. United has consistently maintained that its debit agents are independent contractors, rather than employees, within the meaning of Section 2(3) of the National Labor Relations Act (the "Act"), as amended, 29 U. S. C. § 141 *et seq.* This issue as to the independent contractor or employee status of United's debit agents has been presented to the United States Court of Appeals for the Seventh Circuit on three occasions.

On the first occasion, the Court of Appeals refused enforcement of an order of the National Labor Relations Board (the "Board"), which would have required United to bargain with the Union, on the ground that United had been denied procedural due process. The Court remanded the case to the Board. **United Insurance Company of America v. N. L. R. B.**, 272 F. 2d 446 (C. A. 7, 1959).

On the second occasion, the Court of Appeals squarely met the question raised here and refused to enforce the Board's order directing United to bargain with the Union, on the ground that United's debit agents were, in fact, independent contractors and not employees within the meaning of the Act. **United Insurance Company of America v. N. L. R. B.**, 304 F. 2d 86 (C. A. 7, 1962)

On the third occasion—the instant case—the Court of Appeals reaffirmed its prior decision, again concluding that United's debit agents were independent contractors and not

employees within the meaning of the Act, and once again refused enforcement of a Board order directing United to bargain with the Union. Pet. App. in No. 1409, pp. 17-33; Pet. App. in No. 1410, pp. 1a-15a).²

Following the Court of Appeal's second decision (304 F. 2d 86), United entered into a reinsurance agreement in December, 1963, with Quaker City Life Insurance Company ("Quaker"), a Philadelphia, Pennsylvania corporation. Under the terms of the agreement, United agreed to reinsure Quaker's outstanding policies in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland.

United, which had for some considerable time prior thereto sold and serviced policies in Baltimore City and Anne Arundel County, Maryland, through independent contractor agents, continued to do so subsequent to the execution of the reinsurance agreement. However, Quaker had previously established an employer-employee relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County, Maryland had been represented by the Union.

Upon the effective date of the reinsurance agreement (March 16, 1964), Quaker terminated all of its employees. Shortly thereafter, some of Quaker's former agents in Baltimore City and Anne Arundel County, Maryland applied for and were granted independent agencies by United. Thereupon, the Union immediately sought recognition as the bargaining representative of all of United's debit agents in Baltimore City and Anne Arundel County, Maryland.

When United refused to recognize the Union, the parties entered into a stipulation for certification upon consent election. Paragraph 13 of the stipulation expressly

2. While the first two cases involved United's licensed debit agents in Pennsylvania, and the present case involves United's licensed debit agents in Baltimore City and Anne Arundel County, Maryland, this difference in geography is without significance since United's independent contractor agency system is the same throughout the United States.

reserved to United the right to raise the issue of the independent contractor status of its agents in any subsequent unfair labor practice proceeding brought by the Union (J. A. 1047).

Thereafter, following the Union's certification by the Board, and United's refusal to bargain on the ground that its agents were independent contractors rather than employees within the meaning of the Act, the Union instituted unfair labor practice proceedings against United, charging United with violating Section 8(a)(1) and (5) of the Act. These proceedings eventuated in this case.³

2. Facts. The debit agents involved in this proceeding are independent insurance agents who are engaged by United, pursuant to the terms of individual contracts called the "Agent's Commission Plan", to sell and service United's insurance policies. They primarily sell and service United's industrial life insurance policies.⁴ However, they also sell and service United's commercial life, health and accident, and hospitalization insurance policies (J. A. 25, 173-175, 397, 693, 755). Many of these debit agents are licensed to sell insurance for other companies, includ-

3. This case in no way involves any question of the rights and obligations of a successor employer. That issue was raised by the Union in a separate proceeding which it instituted in January, 1964 in the United States District Court for the District of Columbia (Civil Action No. 57-64). The Union's complaint in that case was dismissed with prejudice by stipulation of the parties on March 16, 1966. Thus, the only question presented to, and decided by, the Court of Appeals in this case was whether, on this particular record, United's debit agents in Baltimore City and Anne Arundel County, Maryland, were employees or independent contractors within the meaning of Section 2(3) of the Act.

4. By Maryland law, industrial life insurance is limited to policies under which premiums are payable on a weekly basis, and policies of \$1,000 or less, under which premiums are payable monthly or more often. Commercial or ordinary life insurance is sold in policies of \$1,000 or more, with premiums payable quarterly, semi-annually, or annually (J. A. 397-398; Ann. Code of Md., Art. 48A, §387).

ing those issuing policies competitive with United's (J. A. 173-174, 291-292, 616, 864).⁵

When an agent is engaged, he is ordinarily given a debit book.⁶ The debit book contains records of policy holders of United from whom the agent agrees to collect premiums and remit the net amount, less commissions, to United (J. A. 174, 194, 696-697). There is no geographical limitation or boundary of activity imposed by a debit book. The areas represented in various debit books may and often do overlap (J. A. 216-219, 695-696, 816-817, 834). A Maryland agent may write insurance anywhere in Maryland (J. A. 217, 411). The only restriction on the agent's ability to write insurance is the various states' insurance laws (J. A. 411). Some Maryland agents have policy holders residing in other states carried in their debit books (J. A. 695-697).

United does not make a calculated effort to arrange the debits so that the agents work in a given geographical area. However, some agents do so themselves by voluntarily transferring policyholders to other agents. This occurs, for example, when a debit area becomes so widespread that, in the opinion of the agent, it is overly difficult to service. Other agents transfer policyholders only when they have trouble collecting premiums. This transfer of policyholders from one agent to another is done by the agents, for their own convenience, and without any re-

5. In order to sell insurance, an agent must be licensed by the State (J. A. 880; Ann. Code of Md., Art. 48A, § 167). The license authorizes the agent to sell specific types of insurance for a specific company (J. A. 880; Ann. Code of Md., Art. 48A, § 166a). The agent pays the fee for his initial license and is not reimbursed by United (J. A. 694, 728, 755, 811). If an agency relationship is terminated, United must notify the State Insurance Department, which, in turn, cancels the agent's license to sell insurance for United (J. A. 881).

6. The term "debit" is usually used to refer to the book that contains the names of and data concerning policyholders serviced by an agent. The term is sometimes used to refer to the area embraced by the addresses in the book at a particular point in time.

striction or limitation by United (J. A. 251, 255-256, 259-262, 307-308, 312-315, 511-513, 697-698, 715-718, 839-840).

For administrative purposes only, each agent is placed, with his consent, on a "staff" of an assistant manager. An agent may not be transferred from one "staff" to another without his consent (J. A. 417). An assistant manager accompanies an agent on his debit only if the agent so requests. When an agent does not produce desirable results, an assistant manager may offer to accompany the agent, but never does so without the agent's consent (J. A. 233-234, 309-310, 484-485, 516-518, 743-744). Assistant managers do not accompany agents on a regular basis (J. A. 460-461), nor are there any specific instructions to the assistant managers as to how they should attempt to aid the debit agents (J. A. 561-563).

The contract of each agent, known as the "Agent's Commission Plan", is terminable at will by either United or the agent (J. A. 1058). Since the agent contracts to produce results, his agency may be terminated if he does not produce results to the extent that may reasonably be expected. Of course, an agency may also be terminated for embezzlement or excessive shortages in an agent's accounts (J. A. 442-443, 568-569). Almost all of United's debit agents in Baltimore City and Anne Arundel County, Maryland are operating under individual contracts embodying the 1962 Revised Agent's Commission Plan, but a few may still be operating under individual contracts incorporating the prior Agent's Commission Schedule. The agents who had signed the earlier agreement were given the option of executing or not executing a contract embodying the Revised Agent's Commission Plan (J. A. 492-494, 892-893).

United's debit agents receive no salary, advance or draw, but are compensated solely by commissions on premiums collected, on new business and on increases in business or collections (J. A. 424-425, 429-430). There is no minimum or maximum limit to the amount of compensation

which a debit agent may earn (J. A. 195-199, 705, 746). The annual income of United's debit agents in Baltimore City and Anne Arundel County, Maryland ranges between \$7,000 and \$20,000 (J. A. 414).

When an agent's servicing of his debit requires him to cover an unusually large, outlying area, he may receive an additional 1% commission on collections. This additional commission varies from week to week with collections, but has no relationship to and does not vary with the agent's travel expenses. In fact, it is entirely possible in any week for travel expenses to increase and for the additional compensation to decrease. Therefore, this additional 1% commission plainly constitutes added compensation in recognition of more difficult conditions, and not reimbursement for travel expenses as such (J. A. 375, 409-410, 519-520, 617).

United's debit agents operate completely on their own. They determine their own hours of work from day to day as well as the days on which they choose to service their debits (J. A. 238-239, 372-373, 402-403, 499, 518-519, 833-836). Although premiums on industrial insurance are due weekly, the agents make their own business arrangements with their policyholders or other collection media as to how often they collect premiums (J. A. 342-343, 398-399, 408-409, 415).

The debit agents are not required to make any specific number of collection calls per day or per week, nor are they required to report to United the number of collection calls they make (J. A. 699-702). They are not required to make any specific number of new business calls, nor are they required to report the number of such calls they make (J. A. 731). Similarly, they are not required to report the number of hours worked, the number of days worked, or the specific days in the week worked or not worked. They are not told what policies they must sell or what prospects to call on for new business (J. A. 178-181, 190-194). The debit agents have no quota to meet

(J. A. 286). They are not told where to seek new business, nor does United give them any leads (J. A. 698).

United's debit agents pay their own business expenses, including transportation, advertising, entertaining, postage, telephone calls, business cards, and gifts to policyholders and new prospects (J. A. 230-233, 431-432, 507-508, 540, 617-618, 706-709, 758-761, 835, 851-852, 1114). Brochures advertising United's policies, sometimes calendars at the end of the year, and occasionally paper matchbooks, are available to the agents on shelves in the district offices, if the agents wish to use them (J. A. 113-120, 747-748).

The agents pay for all their postage, except that when a policyholder chooses to mail his premium together with his premium receipt book in to the district office, the district office, in order to accommodate the policyholder, will sometimes return the premium receipt book to the policyholder paying the postage (J. A. 97-98, 725). Business cards are not furnished to the agents by United. Those agents who desire to use business cards—and many do—purchase them either through the office or from any other source they choose, but always at their own expense (J. A. 757-759).

United's district offices exist as a matter of company organization and administration (J. A. 458-459). United pays all of the expenses of its district offices. Agents may, at their own election, use the tables and chairs in the district offices while preparing reports, but they may not use them for the general conduct of their business. The agents may also occasionally use the telephone available in the district office, but they may not generally use the company phone either for business or personal purposes (J. A. 298-299). Most agents spend no more than three to four hours a week in the district office and, of this time, two to three hours are consumed on the morning when most of them make their weekly reports (J. A. 318, 867-868, 873).

Most agents use a room in their home either exclusively or partially as an office in which they conduct their business. They have desks, phones, sometimes type-

writers, adding machines, files, stationery, etc. The cost of the maintenance of such facilities, and also all the other expenses personally incurred by the agents in the conduct of their business, are deducted as business expenses by them in their income tax returns (J. A. 230-232, 725, 866-867). In addition, some agents hire assistants, at their own expense, to help them with their collections (J. A. 219-221, 410, 708-710, 759-760, 866). However, with respect to selling insurance (as distinguished from making collections or handling claims), one must be licensed by the state whether he sells on his own behalf or on behalf of another (J. A. 456-457).

United furnishes each of the agents involved herein with an insurance rate book containing the rates which have been approved by the Insurance Department of the State of Maryland and which cannot be varied without the approval of that Department. The rate book sets forth certain prohibitions and regulations prescribed by state law; advises the agents of the types of risks which United will not insure; and contains recommendations and suggestions as to the selling and servicing of United's policies (J. A. 92-93, 487-488, 893-894, 1068-1096).

United supplies its agents with various reporting and claim forms as a matter of administrative convenience to both the agents and United. Most relevant of these reporting forms are the "Agent's Weekly Account" (J. A. 1060-1061) and the "Abstract of Agent's Weekly Report" (J. A. 1064) used weekly by the agents in settling with United. On the front side of the former document, the agent lists the status of each policyholder so that United will know what policies are still in force (J. A. 419-420), and on the reverse side the agent shows "premiums paid even and in advance" and "premiums in arrears". The front section of this form is completed weekly, but the reverse side is completed only once every three months (J. A. 56-58).

Since United requires its district office managers to submit weekly reports by Monday, the agents are requested to submit their weekly reports by Thursday or Friday (J. A. 41, 207-216, 503-506, 703). However, the agents may submit their reports on days other than Thursday or Friday and no penalty is imposed for doing so (J. A. 207-216, 505-506, 842-845, 856-857). Further, no agent is required to report in person to the district office to settle his account. Reports may be mailed to the district office; at least one Baltimore agent never brings in his collections or reports in person (J. A. 449-451).

While lapse forms must be submitted to United by the agents in order to inform United of lapsed policies and applications for insurance obviously must be submitted to United (J. A. 81-85, 93-94), the agents are not required to go to the district office for this purpose. Nor are the agents required to go to the district office in order to check the "life register" or to pick up "office pays" and new policies (J. A. 61-63, 236-237, 318-320, 422-423).

In returning net premiums (less commissions) to United, the agents need not turn in cash; money orders and checks are regularly accepted (J. A. 450-451). At least one agent has continually used his personal check for this purpose (J. A. 704). Collections, like the accompanying reports, need not be personally brought to the district office, but may be mailed to the office by the agents (J. A. 451).

On the days when the agents submit their weekly reports to United, an assistant manager will frequently hold an informal meeting of the agents who are present to discuss sales techniques with them. However, attendance at such informal meetings is not required, and United takes no action in the case of agents who elect not to participate (J. A. 522-523, 533, 703, 742-743).

The agents are not required to process or pay claims. However, many of them do so, because it helps them to obtain and retain business. If an agent elects to make advance payment of claims, he may do so without United's

approval, but only at his own risk (J. A. 277, 473-474, 516, 521-522, 703-704, 838-839, 846-850).

United does not withhold federal or state or local income taxes, or payments for pension or welfare or group life insurance. It may, at the agent's specific direction, and only in the amount so directed, accept payments from the agents for these items. If an agent does not wish any of these items to be handled through United, they are not (J. A. 546-553, 704-705, 839, 889-890). Participation in United's group insurance and profit-sharing pension plans is on a strictly voluntary basis (J. A. 71-73, 546-552, 711, 889-890, 1098-1104), and the individual agent and United contribute equally to these plans (J. A. 1101-1102). The agents qualify for participation in United's profit-sharing pension plan as independent contractors under Section 7701(a)(20) of the Internal Revenue Code, which defines "employee" to include not only employees in the traditional, common law sense, but also all full-time life insurance salesmen, whether they be employees or independent contractors.

United's agents receive no paid vacations, no paid holidays, and no paid sick leave (J. A. 427-428, 475-476, 709). The agents decide themselves if and when they will take time off (J. A. 320, 710-711). If a holiday is taken, the agent may request an assistant manager to service his debit or may hire some other person to do so. The same situation obtains if the absence is by reason of illness (J. A. 410, 565-567, 788).

3. Decisions. On the basis of these facts, the Court of Appeals determined that there was not substantial evidence on the record, considered as a whole, to support the Board's conclusion that United's debit agents were employees, rather than independent contractors, within the meaning of Section 2(3) of the Act. Accordingly, the Court of Appeals refused enforcement of the Board's order directing United to bargain with the Union.

The Court of Appeals correctly applied the common law distinction between employees and independent contractors, embodied in Section 2(3) of the Act, to the facts on the record before it and found that, when tested against that principle, the facts utterly failed to demonstrate that United had retained the right to direct and control **the details of the manner and means**⁷ by which the agents conduct their business.

7. Wherever bold face appears in this brief, the emphasis is ours.

ARGUMENT.

1. Petitioners argue that this Court should review the decision of the Court of Appeals because it affects not only United's agents, but all insurance agents, and even traveling salesmen, collection agents, newsboys and milkmen (Pet. in No. 1409, p. 12; Pet. in No. 1410, p. 15). This argument is completely lacking in foundation. Under the law, the resolution of the employe or independent contractor status of a specific group of workers must be determined solely by reference to **the particular facts of the particular case**. See, e.g., **N. L. R. B. v. Lindsay Newspapers, Inc.**, 315 F. 2d 709 (C. A. 5, 1963) (newspaper carriers as employes); **N. L. R. B. v. A. S. Abell Company**, 327 F. 2d 1 (C. A. 4, 1964) (newspaper carriers as independent contractors); **N. L. R. B. v. Nu-Car Carriers**, 189 F. 2d 756 (C. A. 3, 1951) (motor carrier drivers as employes); **National Van Lines, Inc. v. N. L. R. B.**, 273 F. 2d 402 (C. A. 7, 1960) (motor carrier drivers as independent contractors); **Minnesota Milk Company v. N. L. R. B.**, 314 F. 2d 761 (C. A. 8, 1963) (milk routemen as employes). And see, especially, **N. L. R. B. v. Phoenix Mutual Life Insurance Company**, 167 F. 2d 983 (C. A. 7, 1948), where the very Court which here decided that United's debit agents were independent contractors, there decided that Phoenix Mutual's debit agents were employes.

The decision of the Court of Appeals is, therefore, necessarily limited to the facts appearing on this record, and cannot possibly affect any other group of workers whose business relationship varies in the slightest degree from that which exists between United and its debit agents. Moreover, both in this case and in the last case involving the identical parties and the identical issue (Pet. App. in No. 1410, pp. 16a-23a), the Court of Appeals expressly limited its decision to " * * * the facts in the particular case * * *" before it (Pet. App. in No. 1410, p. 21a) and

“* * * the record in this particular case * * *” (Pet. App. in No. 1409, p. 24; Pet. App. in No. 1410, p. 7a) (Emphasis by the Court of Appeals).⁸

Petitioners pretend to discover in the decision of the Court of Appeals a new exception—which they gratuitously term the “business necessity” exception—to the general rule otherwise determinative of employee or independent contractor status. The Court of Appeals neither announced nor relied upon any such “exception” in its decision. Rather, the Court of Appeals expressly reiterated and applied the controlling principle

“* * * that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * * the critical distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business. * * *” (Pet. App. in No. 1409, p. 22; Pet. App. in No. 1410, p. 6a)

Upon the application of this principle, the Court of Appeals concluded that there was not substantial evidence on the record, considered as a whole, to support the Board’s determination and order. The Court of Appeals found

8. Petitioners’ contention that this decision is of far-reaching importance is particularly difficult to understand since petitioners have persistently denied the applicability of a final decision involving one unit of United’s debit agents to any other unit of United’s debit agents, let alone to other workers in no way associated with United. There is presently pending before the Court of Appeals a fourth case, brought by petitioners, raising the very same issue as is raised herein and which was raised in each of the earlier cases (272 F. 2d 446; 304 F. 2d 86, Pet. App. in No. 1409, pp. 16a-23a). Moreover, this latest case involves the very same unit of United’s debit agents as was involved in the Court of Appeals’ 1962 decision (304 F. 2d 86, Pet. App. in No. 1409, pp. 16a-23a).

“* * * no support in the record for some of [the Board’s] findings and but tenuous support for others * * *” (Pet. App. in No. 1409, p. 27; Pet. App. in No. 1410, p. 10a). The Court of Appeals found that the remaining factors relied upon by the Board were entirely consistent with independent contractor status and were

“* * * not indicative of an existence or exercise of control directed to the ‘manner and means’ by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company’s business whether it be carried on through debit agents who are employees or who are independent contractors.” (Pet. App. in No. 1409, p. 27; Pet. App. in No. 1410, p. 10a)

We respectfully submit that, in so concluding, the Court of Appeals was eminently correct. Surely, such factors as the agents’ voluntary attendance at sales meetings, United’s concern that it be informed of the transfer of policies between agents, and United’s insistence that the agents produce reasonable results and make a proper accounting of premiums collected, do not demonstrate that United has retained the right to direct and control **the details of the manner and means** by which the agents conduct their business.

We can appreciate petitioners’ keen sense of disappointment as repeatedly unsuccessful litigants. However, petitioners’ proposal that a blanket rule be adopted declaring all debit insurance agents to be employees is totally without merit. The employee or independent contractor status of a particular group of workers can only be determined, under the law, on a case by case, and not on an industry by industry, basis. Petitioner Union’s outside-the-record estimate that there are approximately 100,000 debit agents in this country (Pet. in No. 1410, p. 15) is,

therefore, completely lacking in significance. The debit agents involved in this case were properly found to be independent contractors, and not employees, within the meaning of Section 2(3) of the Act, solely on the basis of **the particular facts appearing on this particular record**. In its brief to the Court of Appeals, petitioner Union repeatedly asked that Court to consider this case on the facts of "this particular record". Now that the Court of Appeals has done just that, petitioner Union wishes to substitute an industry approach totally unsupported by the record.

Petitioner Union's attack upon the Court of Appeals' decision as based upon that Court's " * * * own private preferences and prejudices * * *" (Pet. in No. 1410; p. 12) is also wholly unjustified and insupportable. As the Court of Appeals, fully aware of the necessity for case by case adjudications in this area of the law, so succinctly stated in the last case involving United's debit agents:

" * * * some insurance companies have established an employer-employee relationship such as the company in *N. L. R. B. v. Phoenix Mutual Life Insurance Company*, *supra* [167 F. 2d 983 (C. A. 7, 1948)].

"In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do." (Pet. App. in No. 1410, p. 23a)

2. Petitioners also urge, as a reason for this Court to grant review, that the Court of Appeals improperly exercised its power of judicial review. The short answer to this contention was given by this Court in its decision in **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474 (1951):

"Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of

the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." (340 U. S. at 490-491)

This case is not that "rare instance". The Court of Appeals properly apprehended and applied the governing standard of review:

"Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera* (340 U. S. p. 489) as affording '[s]ome scope for judicial discretion' and approved with the express realization that '[t]here are no talismanic words that can avoid the process of judgment', and the admonitions (340 U. S. 488 and 496) that '[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight' and that the examiner's findings are not to be 'given more weight than in reason and in the light of judicial experience they deserve' and 'are to be considered along with the consistency and inherent probability of testimony'. * * *" (Pet. App. in No. 1409, p. 24; Pet. App. in No. 1410, pp. 7a-8a)

Guided by this standard, and considering the record, including the overwhelming body of evidence opposed to the Board's view, as a whole, the Court of Appeals concluded that

"* * * in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or

equivocal nature of the factors embraced in other findings, we are confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions." (Pet. App. in No. 1409, p. 32; Pet. App. in No. 1410, p. 15a)

In so concluding, we respectfully submit, the Court of Appeals stayed well within the bounds of judicial review outlined by this Court in *Universal Camera, supra*. The Court of Appeals not only found " * * * no support in the record for some of [the Board's] findings and but tenuous support for others * * *" (Pet. App. in No. 1409, p. 27; Pet. App. in No. 1410, p. 10a); it also found that the Board's findings and conclusions were, in material part, erroneously predicated upon the trial examiner's own subjective impressions of certain off-the-stand demeanor allegedly exhibited by United's debit agents in the hearing room.⁹

9. With respect to this point, the Court of Appeals stated:

"In adopting the trial examiner's findings, conclusions, and recommendations the Board specifically disavows reliance upon the demeanor 'observation' made by the examiner. But we do not perceive how this disavowal can serve to remove from the examiner's findings and conclusions the flavor with which his demeanor observation tainted them. Cf. *Wheeler v. N. L. R. B.*, D. C. Cir., 314 F. 2d 260, 263; *N. L. R. B. v. American Federation of Television and Radio Artists*, 6 Cir., 285 F. 2d 902, 903. Our study of the record leaves us with a distinctive impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner's credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the 'employee attitude' the examiner so tenuously surmised was reflected by debit agents' off-the-stand demeanor." (Pet. App. in No. 1409, p. 32; Pet. App. in No. 1410, pp. 14a-15a).

Petitioners' unhappiness with the court's ultimate conclusion is surely understandable but, just as surely, it is beside the point.

3. Petitioners finally assert that this case is one of "undisputed facts" (Pet. in No. 1409, p. 12; Pet. in No. 1410, p. 17). Yet petitioners and respondent have engaged in extensive litigation, during the past fourteen years, over the existence and significance of the very facts petitioners now claim to be "undisputed". A comparison of the facts set forth in the respective petitions with the facts set forth in the Court of Appeals' decision or in this brief readily demonstrates the factual conflicts inherent in this case. Under the law, resolution of the issue raised in this case can only be determined by reference to **the particular facts of the particular case**. This case plainly turned upon its own peculiar facts and is, indeed, expressly limited to them.

The decision of the Court of Appeals cannot, therefore, possibly be characterized as one of far-reaching importance or as being in conflict with any other decision of any other Court of Appeals. Petitioner Union's contention that the decision in this case cannot be reconciled with the decision in **Capital Life and Health Ins. Co. v. Bowers**, 186 F. 2d 943 (C. A. 4, 1951) is patently absurd (Pet. in No. 1409, p. 17). Neither the issue nor the facts in that case bear the slightest resemblance to those presented in the instant case. The absence of any conflict between the circuits on this issue is further underscored by petitioner N. L. R. B.'s failure to advance such a ground as a reason for the granting of its petition.

In short, all debit insurance agents are not, simply by virtue of their being debit insurance agents, employees within the meaning of Section 2(3) of the Act, as petitioners would have this Court hold. Nor are they all independent contractors. Under the law, whether a group of debit agents, or any other group, has employee rather than independent contractor status, can only be ascertained by

first determining, on the facts of the particular case, whether " * * * the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished * * *" (Pet. App. in No. 1409, p. 22; Pet. App. in No. 1410, p. 6a).

Accordingly, it is entirely clear that the same Court of Appeals may, in one case, properly determine that the debit agents of an insurance company are employees [see, e.g., **N. L. R. B. v. Phoenix Mutual Life Insurance Company**, 167 F.2d 983 (C. A. 7, 1948)] and, in a second case, as here, properly determine that the debit agents of another insurance company are independent contractors. The law anticipates nothing less and requires nothing more.

CONCLUSION.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

BERNARD G. SEGAL,

IRVING R. SEGAL,

HERBERT G. KEENE, JR.,

*Attorneys for Respondent, United
Insurance Company of America.*

Dated: June 19, 1967.

NOV 24 1967

Nos. 178 and 179

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 178

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

No. 179

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR INSURANCE WORKERS
INTERNATIONAL UNION, AFL-CIO**

ISAAC N. GRONER

1730 K Street, N.W.

Washington, D. C. 20006

*Attorney for Insurance
Workers International
Union, AFL-CIO*

Of Counsel:

COLE AND GRONER

1730 K Street, N.W.

Washington, D. C. 20006

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. These Agents Are Not Independent Businessmen And Do Not Have Or Operate Their Own Busi- nesses	5
1. Place of Work	6
2. Organizational Hierarchy	10
3. Physical Presence of the Company	11
a. Accompaniment On Debit In Company's Discretion	11
b. Compulsory Weekly Reporting To The Office	14
4. Limited Authority of These Agents	19
5. Capital Investment and Risk	20
B. These Agents Do Not Have Any Means Of Liveli- hood Other Than Their Jobs As Agents With The Company; They Have No Real Bargaining Power Vis-a-Vis The Company	22
1. No Experience or Previous Training Required	22
2. The Company Trains the Agents in the Manner and Means of Doing Their Work	22
3. No Other Means of Livelihood	24
C. The Rates And Manner Of Compensation Pay- ment Are Determined And Controlled By The Company	25
1. Rates of Compensation	25

	Page
2. Manner of Payment	27
D. The Company Reserves And Exercises The Right To Fire These Agents	29
E. Other Pertinent Facts	35
1. Company Control Over Transfers and Lapses of Insurance Policies	35
2. The Continuation of the Quaker City Relation- ship	38
3. Company Payment of Social Security Taxes ..	42
SUMMARY OF ARGUMENT	44
ARGUMENT	47
I. These Insurance Agents Must Be Legally Cate- gorized As "Employees"	47
A. Applicable Legal Standards	47
1. "Independent Contractor" in the common law	47
2. "Independent Contractor" in Section 2(3) of the Act	50
3. "Independent Contractor" in the decisions of this Court	53
B. These Agents Are "Employees" in Accord- ance With the Applicable Legal Standards ..	54
1. Common Law	54
2. Congressional Statements	55
3. Law of Agency	55
a. Extent Of Control	56
b. Distinct Occupation Or Business	57
c. How Work Is Usually Done	57
d. Skill Required	62
e. Instrumentalities, Tools And Place Of Work	62

	Page
f. Length Of Time	63
g. Method Of Payment	63
h. Regular Business Of The Employer	63
i. Belief Of Parties	63
j. Principal In Business	64
4. Decisions of this Court	64
II. The Court Below Misconceived The Applicable Legal Standards	65
A. The Court Below Misconceived the Scope of Review Open to It under the Act	65
B. The Court Below Misconceived the "Right of Control Test"	67
CONCLUSION	70
*APPENDIX: Statutory Provisions Involved	1a

AUTHORITIES CITED

CASES:

Atlanta Life Insurance Company v. Stanley, 276 Ala. 642, 165 So.2d 731 (1964)	58
Board v. Hearst Publications, 322 U.S. 111 (1944) 45, 50-52	
Boire v. Greyhound Corp., 376 U.S. 473 (1964)	51
Bush v. Steinman, 1 B. & P. 404, 126 Eng. Rep. 978 (1799)	48
Capital Life & Health Ins. Co. v. Bowers, 186 F.2d 943 (4 Cir. 1951)	58-59
Carter's Deps. v. Pa. St. Ins. Co., 209 S.C. 67, 38 S.E. 2d 905 (1946)	58
Chatelain v. Thackeray, 98 Utah 525, 100 P.2d 191 (1940)	57-58
Dillon v. Prudential Ins. Co. of America, 75 Cal. App. 266, 242 Pac. 736 (1925)	58
Fidelity Union Life Ins. Co. v. McGinnis, 62 S.W.2d 186 (Civ. App. Tex. 1933)	58
Gillespie v. Ford, 225 S.C. 104, 81 S.E.2d 44 (1954) ..	58
Goldberg v. Whitaker House Coop., 366 U.S. 28 (1961) 53, 64	

	Page.
Hanna Mining v. Marine Engineers, 381 U.S. 181 (1965)	66
Hearst Publications v. National Labor Relations Board, 136 F.2d 608 (9 Cir. 1943)	53
Hilliard v. Richardson, 3 Gray (69 Mass.) 349 (1855)	48
Industrial Com. v. Northwestern Co., 103 Colo. 550, 88 P.2d 560 (1939)	58
Insurance Agents' International Union, 119 NLRB 768 (1957), reversed on other grounds, 104 U.S. App. D.C. 218, 260 F.2d 736 (1958), affirmed, 361 U.S. 477 (1960)	60
Labor Board v. Walton Mfg. Co., 369 U.S. 404 (1962)	65
Life & Casualty Co. v. U.C.C., 178 Va. 46, 16 S.E.2d 357 (1941)	58
Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204 (1826)	48
Martin v. State Farm Mutual Automobile Ins. Co., 108 So.2d 21 (Ct. App: La. 1958)	58
Metropolitan Life Insurance Company, 156 NLRB 1408 (1966), upon remand, Metropolitan Life Ins. Co. v. Labor Board, 380 U.S. 438 (1965)	60
Metropolitan Life Insurance Company, 138 NLRB 512 (1962)	60
Milligan v. Wedge, 12 Ad. & E. 737, 10 L.J.Q.B. 19, 113 Eng. Rep. 993 (1840)	47
N.L.R.B. v. American Federation of Television and Radio Artists, 285 F.2d 902 (6 Cir. 1961)	66
N.L.R.B. v. Jackson Maintenance Corp., 283 F.2d 569 (2 Cir. 1960)	66
N.L.R.B. v. Johnson, 310 F.2d 550 (6 Cir. 1962)	66
Pennsylvania R. Co. v. Barlion, 172 F.2d 710 (6 Cir. 1949)	69
Pennsylvania R. Co. v. Roth, 163 F.2d 161 (6 Cir. 1947)	69
Philadelphia Record Company, 69 NLRB 1232 (1946)	50
Quaker City Life Ins. Co., 134 NLRB 960 (1961), en- forced, 319 F.2d 690 (4 Cir. 1963)	60
Quarman v. Burnett, 6 M. & W. 499, 151 Eng. Rep. 509 (1840)	48
Review Board of U. Comp., etc. v. Mammoth L. & A. Ins. Co., 111 Ind. App. 660, 42 N.E.2d 379 (1942)	58
Richards v. Metropolitan Life Ins. Co., 19 Cal.2d 236, 120 P.2d 650 (1941)	58, 62-63
Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947)	63

Index Continued

v

	Page
Singer Manufacturing Co. v. Rahn, 132 U.S. 518 (1889)	49
Superior Ins. Co., Ap. v. Unemp. Comp. Bd., 148 Pa. Super. 307, 25 A.2d 88 (1942)	58
Superior Life, & c., Co. v. Board of Review, & c., 127 N.J.L. 537, 23 A.2d 806 (1942)	58
Twentieth Century-Fox Film Corp., 32 NLRB 717 (1941)	50
Unemployment Compensation Com. v. Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939)	58
United States v. Silk, 331 U.S. 704 (1947)	53-54, 64

STATUTES AND LEGISLATIVE MATERIALS

House Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947)	52
H.Rep. No. 245, 80th Cong., 1st Sess. (1947)	51-52
Internal Revenue Code, Title 26, U.S.C.	
Section 3121(d)	42-44
Section 7710(a)(20)	42
National Labor Relations Act, 29 U.S.C. §§ 141 et seq.	
Section 2(3), 29 U.S.C. § 152(3)	3, 43, 50-53, 1a
Section 7, 29 U.S.C. § 157	3, 1a
Sections 8(a)(1) and (5), 29 U.S.C. §§ 158(a)(1) and (5)	3, 2a
Sections 10(e) and (f), 29 U.S.C. §§ 10(e) and (f)	3, 2a-4a

ARTICLES AND TEXTBOOKS

Davis, M.E., "Modern Industrial Life Insurance," in D. McCahan, Life Insurance Trends at Mid-Century, 115 (1950)	61
Harper, "The Basis of the Immunity of an Employer of an Independent Contractor," 10 Ind. L.J. 494 (1935)	48
Hoffman, F.L., "Industrial Life Insurance," in H.P. Dunham, The Business of Insurance (1912)	62
Jacobs, "Are 'Independent Contractors' Really Independent?", 3 De Paul L. Rev. 23 (1953)	48
Larson, The Law of Workmen's Compensation (1966)	50, 63, 69

	Page
Lederer, R.W., Home Office and Field Agency Organization-Life (Life Office Management Association; Rev. ed. 1966)	61
Leidy, "Salesmen As Independent Contractors," 28 Mich. L. Rev. 365 (1930)	48, 50
Restatement of the Law of Agency 2d (1958) ..	55-56, 64, 65
Taylor, M., The Social Cost of Industrial Insurance (1933)	61-62
Wolfe, "Determination of Employer-Employee Relationships In Social Legislation," 41 Colum. L. Rev. 1015 (1941)	48

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 178

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

No. 179

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF FOR INSURANCE WORKERS
INTERNATIONAL UNION, AFL-CIO**

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 371 F. 2d 316 and is reprinted in the Joint Appendix herein ("A." hereinafter) at 1231. The Decision and Order of the National Labor Relations Board is re-

ported at 154 NLRB 38 (and at A. 1199) and includes the Trial Examiner's Decision (A. 1122).

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1966. On March 16, 1967, Mr. Justice Clark signed an Order extending the time for the filing of a petition for a writ of certiorari to and including May 20, 1967. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1); and that of the Court below, under 29 U.S.C. § 160. The petition was filed on May 20, 1967. This Court granted the petition of the Insurance Workers International Union, AFL-CIO ("Union" hereinafter) in No. 179 on October 9, 1967, consolidating the case with No. 178, *National Labor Relations Board v. United Insurance Company of America*, involving the identical case below. 389 U.S. 815, A. 1245-1246.

QUESTIONS PRESENTED

1. May the National Labor Relations Board ("Board" hereinafter) find workers to be "employees" rather than "independent contractors" within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* ("Act" hereinafter), when the Board has found facts such as are found and disclosed on this record as to the debit¹ insurance agents here involved—that they are not independent businessmen and do not own or operate their own businesses; that they are an integral part of their employer's organization and business; that they may be subject to physical supervision on their debits or in the em-

¹ The word "debit" is generally used to signify either the group of policyholders whose premiums have been assigned to the particular agent for collection and servicing, or the geographic area within which the bulk of those policyholders is concentrated.

ployer's office to which they are assigned as the employer directs; that they depend upon the employer for their livelihood and have no real individual bargaining power vis-a-vis the employer; that the employer unilaterally dictates the rates and manner of their compensation; that the employer reserves the right to hire them and fire them; that they may not transfer other policyholders among themselves and require their employer's approval as to many details of their work; and that they are subject to the right of control otherwise exercised and effectively reserved by their employer over how the work shall be done as well as what work shall be done?

2. If the answer to the foregoing question is in the affirmative and if the Board so finds, may a Court of Appeals refuse to enforce the Board's Order—and particularly on the ground that the Court believes that many of the controls which their employer imposes upon the agents are inherent in the employer's business?

STATUTORY PROVISIONS INVOLVED

The statutory provisions primarily involved are those of the Act. Pertinent excerpts from Sections 2(3), 7, 8(a)(1) and (5), and 10(e) and (f) of the Act are set forth in the Appendix, p. 1a, *infra*.

STATEMENT OF THE CASE

This case presents significant questions as to the interpretation and scope of the exception of "an independent contractor" from the definition of an "employee" entitled to the protection and coverage of the Act (Section 2(3), set out p. 1a, *infra*), in the context of a refusal to bargain case. On August 14, 1964, the

Board certified the Union in the appropriate bargaining unit of the debit insurance agents employed by the Respondent United Insurance Company of America ("Company" hereinafter), in its Districts in Baltimore City and Anne Arundel County, Maryland. Thereafter, the Company refused to bargain on the ground that these agents were "independent contractors" and not "employees" within the meaning of the Act; and the Board issued a Complaint charging the Company with violation of Sections 8(a)(1) and (5) of the Act, in sum, refusal to bargain. The factual record in this case was made in hearings before the Trial Examiner; witnesses were heard on seven hearing days on various hearing dates, in December, 1964.

After detailed oral argument and Briefs, the Trial Examiner issued his Decision on May 13, 1965, discussing the pertinent facts involved and finding that these agents were employees and not independent contractors. 154 NLRB at 38-60, A. 1122-1183. In appraising the facts of record, the Trial Examiner declared, "Reliance will be placed on functions and requirements as carried out in actual performance * * *." 154 NLRB at 43, A. 1136. The legal test applied was "the right to control the manner and means" of the agents' work, emphasizing "that exercise of control is not necessary to a finding of employer-employee status if the right to control be shown; and that the exercise of control is itself evidence that the right exists." *Id.* at 39; 1125.

On July 28, 1965, the Board issued its Decision and Order, adopting the findings and conclusions of the Trial Examiner, except that it expressly disavowed reliance on a particular footnote in the Examiner's

Decision. *Id.* at 38, n. 2, 1200, n. 2. On December 21, 1966, for reasons discussed hereinafter, the Court below refused to enforce the Order of the Board.

The significant facts of record, using "facts" to denote the objective and particularized description of what these agents and their supervisors have done, said or written, are not significantly in dispute. There is no material dispute of "fact" in that sense for present purposes, as between what the Board and the Trial Examiner found, on the one hand, and what the Court below found or assumed, on the other—although there are, of course, sharp disagreements as to the legal characterization and pertinence of particular facts, and as to the ultimate conclusion of whether these agents are employees or independent contractors. The pertinent facts may be summarized as follows.

A. These Agents Are Not Independent Businessmen and Do Not Have or Operate Their Own Businesses.

These agents are *not* independent businessmen. They do not have or operate their own businesses. In no way do they represent themselves to the public as being independent contractors or entrepreneurs. They do not have their own places for carrying on their work; the office to which they report and the debit which they cover belong to the Company. They do not have their own organization; they are part and parcel of the Company's organization. They are not free to avoid the regular direct physical presence of their managers and assistant managers; the Company reserves the right to subject them to this presence at its own election. They do not own what they sell nor can they make individualized contracts with any of their customers; these fundamental controls are in the hands of the

Company alone. These agents do not make any investment or take any capital risk; the investment is made and the risk is assumed solely by the Company.

1. Place of Work.

These agents have no independent place of work. Neither the business office which they use nor the debit which they work are their own or subject to their control; they are the Company's exclusively and subject to its sole control.

These agents do not purport to have their own trade or business name, or place of business. They work and represent themselves to the public under the name of the Company, and solely as agents for the Company; and they work out of a particular district office of the Company to which they are assigned by the Company. They are not separately or independently listed in the business section of the telephone directory. A. 818. Those who use business cards show the business address on the cards as the district office of the Company. A. 758. None of the agents involved in the case has any business office for which he pays rent. A. 725, 788. None of them maintains or needs any other business office. A. 125, 230. They may have a work area in their own homes for which they may take a tax deduction, like a desk in a son's bedroom, A. 822, or a space in the family community room, A. 866, or a cubbyhole, A. 230; but not any place of business. As the Board found,

"With respect to rent, postage, and telephone, these are provided by the Company as well as office space for the agents' use when they come in to attend meetings, settle their accounts weekly, receive mail or request that the office mail something for them, and pick up telephone messages. Provision of such facilities by the Company and use by the

agents must be recognized although agents also use their home telephone and some of them maintain an office or workspace with a desk, etc., in their home." 154 NLRB at 58, A. 1179.

The Company assigns each of these agents to a particular district and district office. A. 40-43, 417, 854. The Company owns the district office buildings. A. 458. The agents pay none of the cost of purchase or of the expenses of maintenance; no rent or fee is charged these agents for their place of work is owned or leased, and maintained, solely by the Company. A. 122.

Likewise, the Company provides and pays all the expenses of the clerical staff and equipment which is available to these agents at their district office. A. 121-123, 298-302, 339-340, 822. In addition, the forms and sales materials which the agents require for their work are made available to them at their district office, entirely at the Company's expense. A. 54-55, 94, 113-119. The Company forms "*are required* when a particular piece of business must be done, for example, the lapsing of a policy or the transferring of a policy." A. 285 (emphasis added). All these forms and materials contain only the name of the Company; the name of the agent does not appear thereon. A. 115, 119; General Counsel Exhibits 23A-23J, A. 113-117.

The Company determined upon the district office in the field, of the size and function set forth on this record, as the fundamental administrative and geographic manner and means of doing this work. The Company selected the manner and means of the district offices in the field as opposed to any other possible organization or structure for this business, for its own interests and purposes. A. 417, 458-459. It deemed this manner and means necessary and desirable, in its

own judgment, to provide "some formulation in order to take care of the details." A. 417. These agents have no alternative to adhering to the manner and means of a district office organization and administration of their work.

Identically, and perhaps even more significantly, the fundamental manner and means of doing this work by debits was established and is controlled unilaterally by the Company. When a new agent commences work for the Company, "He is furnished with a debit book in which policyholders are listed." A. 417. "The book is provided by the company. * * * The policyholders are already in this debit book, have been written by former agents." A. 418. The new agent has the function of collecting the premiums from the policyholders whose names are in the debit book given to him by the Company, free of charge, without any contribution or effort on his part.

The debit book, which is the focus of an agent's activity, is the Company's property, and only the Company's. A. 490. On the question whether the Company reserves the right to take any debit book away from an agent whenever it desires to, Agency Vice President Rose, a witness called by the Company, testified as follows:

"Q. During his [the agent's] service with the company, could not the company demand to see its own property, the debit book, at any time?

"A. Yes, I would say that they could.

"Q. At any time?

"A. Yes." *Ibid.*

When the individual agent leaves, he must return the debit book to the Company. A. 149. He cannot take it with him, any more than he can take with him any of

the policyholders listed therein. A. 473. On this point the Board stated, "That the agent is dealing with company property is indicated not only by his handling of collections, but by the fact that when his relationship with the Company is terminated, he is required to turn in his debit book." 154 NLRB at 50, A. 1155.

Whether the place of work be deemed the district office or the debit or both, it is subject to the unilateral control of the Company. The assignment of agents to particular districts may be changed by the Company on its own. A. 480-481. As one agent testified as to the Company's conduct when he and other agents who had previously worked for the Quaker City Life Insurance Company ("Quaker City" hereinafter) commenced their relationship with the Company, discussing a notice posted in the office:

"It stated the debit numbers that the United was now to call the debit that the man was possessing, the man's name beside the debit numbers, and which district he was going to be in, and we were also informed what day to report.

* * * * *

"* * * This paper showed us that we were—well, I asked the manager at the time, Mr. Formwalt, where was I going to be at, and he said, 'Well, it is on the paper there, which district you are in and which staff you are going to be assigned to.' So I went over to the paper and looked and I was in Mr. Kropf's district. At the time, the staff was unassigned. There was no assistant manager on this particular staff. So this moved me from the second floor up to the third floor, and it moved my reporting day from a Friday to a Thursday." A. 355-356.

As the Board found, "Each assistant manager checks the weekly account sheets and other forms required of

his debit agents by the Company, offers advice, periodically offers assistance in making calls, actually does assist the five agents under him, and prepares a weekly report with the agents' assistance." 154 NLRB at 53, A. 1164.

2. Organizational Hierarchy.

Far from being on their own and apart and independent from the Company's organization, these agents constitute an integral and inseparable element in the Company's organization and administrative structure. They are each and all assigned to a particular district office, which is headed by a particular manager; and also to a particular staff within that district, which is headed by a particular assistant manager; and, as we have seen, to a particular one of the Company's debits. A. 40-42, 127, 201, 355-356, 417.

The number of agents assigned by the Company to each district and to each staff appears small enough to insure a close relationship—intimate knowledge by management of what each agent is doing and how he is doing it. There are about twenty agents in each district. A. 40. "Each assistant manager has control of or oversees a staff of five agents." A. 42. The Company decided that five or six are the "proper number" for assistant managers to work with. A. 471-472.

The Board found, "That assistant managers assist and have under review only five agents indicates the closeness, immediacy, and personal nature of such review; and close review itself suggests and indeed would be meaningless without supervision and control since it does not appear that the Company engages in such close and continuous review merely out of curiosity." 154 NLRB at 53, A. 1165.

- Administratively above the agents and their staff managers, the Company operates an entire "agency organization," from Agency Vice President Rose down through "regional managers, state managers, division managers, district managers." A. 396.

Moreover, the relationship between these agents and the Company is not *ad hoc* or transitory. The Company admittedly and deliberately makes length of service a factor in the computation of certain commissions, and pensions and other rights as well; and in general, encourages prolonged service by agents, in its own interest. A. 418-419.

3. Physical Presence of the Company.

The Company reserves the right at its election to subject the agent to the direct physical presence of the agent's manager and assistant manager, as well as special writers and other management officials. This right is most actively exercised under current practice, in two principal ways: (a) assigning assistant managers and special writers physically to accompany the agent as the agent does his work outside his district office; and (b) requiring physical reporting to their district offices by all agents at least one day each week and by individual agents as the Company may direct.

a. *Accompaniment On Debit In Company's Discretion.*

The Company exercises direct physical control over the agents outside the office and while they are working on their debits, by having their assistant managers or other management staff physically accompany them. This is the basic function of the assistant managers

and special writers, as demonstrated by the reports in the General Counsel Exhibit 40 series. A. 344-346. The designation on the form, "Assignment this week," and the insertion under that column heading of the name of the agent whom the particular management representative has been accompanying that week, demonstrate that the regular assignment of these management personnel is to accompany the individual agent on his debit.

The agent's assistant manager announces these assignments—tells the agents on his staff which of them will be accompanied during the following week by himself and which by special writers or other management representatives—at the regular weekly staff meeting. A. 131-132. There is no particular discussion or formality; the assistant manager merely tells the agent of his selection, "I will be with you this week." A. 134-135. As to this the Board found, "the assistant manager is required by the Company to assist the agent even to the extent of making calls on policyholders. This, I find, is not dependent on the agent's request." 154 NLRB at 53, A. 1164.

The testimony of Divisional Manager Formwalt, a witness called by the Company, is instructive on this score:

"I think the assistant manager will say 'John, may I go out with you this week? You had a little low production the last couple of weeks. How about me going with you?' and John will say, 'Well, okay.' He can refuse it and sometimes he has, because he has something to do, and he will pick up someone else, or the agent might say, 'Well, I think I have a good week going. How about going with me, Bill?'" A. 517.

This testimony reaffirms that the assistant manager has exercised—and thus *a fortiori* reserves—the right of assignment in terms of the assistant manager's own appraisal of the adequacy of the agent's performance. It reaffirms that the agent requires some explanation to dispute or refuse any assignment made by the assistant managers. He must cite some excuse or reason—"because he has something to do." Manifestly, in the ordinary course of business, the agent simply accepts the assignment, and the assistant manager accompanies the agent of his own selection on the debit. Should the agent have a sufficient excuse, what then happens, according to Formwalt, is that the assistant manager "will pick up someone else * * *." While Agency Vice President Rose at first seemed to attempt to give the impression that Company management did not physically accompany the agent on his debit unless the agent requested it, Rose conceded that he himself knew of no agent in this unit who had ever made any such request. A. 479. And Rose expressly and voluntarily amended his testimony to show that, in at least some of the districts involved in this case, the assistant manager does regularly initiate the arrangement to accompany the agent on his debit. A. 485. Moreover, the manager himself may accompany the agent and has authority to determine when an agent shall be accompanied. "With the experience that Mr. Kropf has in the insurance business, and he would not have been made a manager unless he had the experience," Formwalt testified, "I do not question his judgment on when he is going with a man or why he is going with a man. We entirely leave that up to the district manager." A. 594.

Additionally, there is or may be direct physical supervision on a debit analysis review and on an audit. Both are procedures of the Company which it can invoke at such times and circumstances as it determines alone. Debit analyses may be ordered by the agent's assistant manager. A. 606. They may evidently be ordered by the manager; in one district five debits were analyzed in one week. General Counsel Exhibit 40B, A. 346-347. And whenever Divisional Manager Formwalt wants a debit analyzed, he merely directs it to be analyzed, as he sees fit. A. 613. He likewise has authority to order audits at any time. A. 615. While the Company has no firm rules as to the frequency with which it will subject each agent to audits or field inspections, there would probably be at least one each year. A. 569. In these fashions the Company exercises its right to impose its direct physical presence upon these agents.

b. Compulsory Weekly Reporting To The Office.

There is ample evidence supporting the conclusion that these agents are required physically to report to their district office at least once each week and to attend meetings which the Company then and there conducts. The Board found, "The requirement to report and to attend weekly meetings is recognized even if it can be stretched or waived." 154 NLRB at 47, A: 1146.

The principal witness called by the General Counsel testified as follows:

"We attend every Thursday morning, unless it would be a holiday or something and the company would then excuse us after we had turned in our money, or in certain instances where collections are heavy, like in Baltimore it is the 11th of the month, welfare checks, they will excuse us early.

Other than that, there is always a sales meeting by the district manager and by the assistant manager. All agents in the district attend unless they are excused." A. 41.

Even when the agent was on the witness stand at this very hearing he had to obtain permission to leave before the meeting was completed. "I advised Mr. Dempsey [my Manager] that the hearing was to be convened again that day and that my presence was required, and he said, 'Fine, you can go whenever you have completed your business.'" A. 270.

"I would say in the affirmative that there is a rule that says we must report on Thursday." A. 317. "We are required to report at 8:30." A. 61.

All agents in a district office report at the same time. A. 41. The manager of the district determines and announces the reporting time and day or days which the agents in his district will observe. A. 127, 202-207, 356, 537-538. Managers have changed the reporting day, in general, A. 356, or for particular weeks, A. 332-334. The Company assumes that all agents will be present at the meetings, for this is how the Company gives the agents the information it would like them to have, for example about contests. A. 602.

On the requirement of physical reporting, the Trial Examiner's conclusion adopted by the Board was as follows: "Having considered the various denials, explanations, and contradictions, I find that the debit agents are required to appear at their district office one morning each week; that there are usually sales meetings with the manager and then the assistant manager (sometimes also with higher company officials), followed by individual meetings and discussions be-

tween the agents in turn and their assistant manager; and that the agents on that morning turn in their weekly reports and collections." 154 NLRB at 46, A. 1144.

Agency Vice President Rose could not name any agent in this particular bargaining unit who did not physically come to the office and physically hand in his weekly accounting reports at his district office. A. 450. Agent Von Saleski, also a witness called by the Company, confirmed that all agents in his district reported on the same day, A. 718; and that managerial consent was required before an agent could come into the office with his weekly report on some other morning. As an example of an occasion when he had been permitted to report on a day other than the regular reporting day, which for him was set by the Company for Thursday, Von Saleski stated, "I had business lined up, new business prospects, on a Thursday, and phoned the office if it would be all right if I would come in Wednesday and leave it there until Thursday or if they would accept it on Friday instead, and there was consent on their part." A. 720. He confirmed the requirement that the report must be submitted personally; it cannot be mailed in, the agent must physically present it to management. A. 742.

The principal purpose of the reporting is for the agents to submit reports which management can check to determine how the agents are performing their work. For one thing, the agents report the amount of money which they have collected on behalf of the Company. As the Board found, "The point is not merely that the money belongs to the Company, but that the debit agent is functioning as its direct and immediate agent and on its behalf rather than on his own. The Com-

pany is not itself obtaining these moneys by supervisors or any who it admits are employees, but is utilizing, as completely as it could any employees, the services of its debit agents." 154 NLRB at 46, A. 1144.

The weekly accounts are submitted to the assistant manager for his inspection and approval. A. 55, 1060 ("Inspected by"), 1062 ("Inspected By"), 1064 ("Approved By"). If the reports are "incorrect," the assistant manager "checks them and tells the agent that they are incorrect and they should be corrected." A. 483. The assistant manager makes clear how they must be corrected, and the agent complies.

The accounts may not be settled by personal check, except with management approval. A. 450. The agent "would have to go to his manager and request to turn in a personal check. The manager does have the power to initial or 'O.K.' the personal check. Then it can be turned in." A. 68.

Further, the agent turns in to his assistant manager the applications for new insurance which he has written during the week. A. 59, 85. The applications must be checked carefully by the district manager also. A. 1110. If errors are made in the applications, the Company management will return the application to the agent involved and will talk to the agent about the errors. A. 599-600. As to this, the Board found, "Aside from the required use of company forms by agents in submitting information, the Company's right to check each policyholder's account and the breakdown as well as the sum total of the agent's collections, together with the detailed oversight by the

assistant manager, reflects a degree of supervision which negates independent contractor status." 154 NLRB at 47, A. 1148.

The Company may take the occasion of his reporting—as any other occasion—for discussing his work with the agent. On an occasion when Agent Roberts reported, for example, he had a talk with Divisional Manager Formwalt that ultimately led to a successful demand for Roberts' resignation. "One thing led to another," Formwalt related, "when the man came into the office. I mentioned to Mr. Roberts you are in the hole. You are off draw." A. 600.

In addition to the regular reporting days, individual agents may be required to come into the office to talk to management, as management desires. Agent Gore, for example, was thus asked to report to the office on a day which was not his regular reporting day. A. 632.

Management asserts the right to impose its physical presence on these agents by calling them in for conferences when and as it wills. One manager's report, for example, not specifying whether it was done on a regular report day or on an occasion when the agents specified were directed to report specially, was as follows:

"Have talked with Mr. Daugherty and Mr. Hicks about their let down in the current quarter. Both seem to realize they have accomplished very little and promise to try and do better in the coming quarter. Mr. Gundina was assisted by Mr. King, assistant manager, and was also talked to by the both of us." General Counsel Exhibit 40A, A. 344-346.

In sum, as the Board found, "The regularity of the exhortation and advice at meetings and as directed in

company memorandums, and the frequency of special contests and awards belie whatever minimum of independence and arm's length dealing might be deemed necessary to characterize independent contractor status * * *." 154 NLRB at 46, A. 1145.

4. Limited Authority of These Agents.

Further, the insurance policies which these agents sell are the Company's and the Company's alone. This is no distributorship relationship such as an automobile dealership, where a product is sold and title passes from the manufacturer to the dealer, and the ultimate consumer purchases it from the dealer, and where the dealer assumes some or all of the risk of financial loss if the products are not sold; in this case, quite to the contrary, at no point does the agent have title to the policy nor can he assert any control. The only relationship which the consumer has is with the Company. The consumer knows that the policy he has purchased is the Company's and binds only the Company. The consumer knows the agent only as the agent of the Company.

Certainly these agents may not bargain or "deal" in order to make a sale, like a truly independent automobile agency or independent contractorship can and does. "*Agents Are Not Authorized To Make Contracts*—alter, or discharge contracts, waive forfeitures, quote rates other than those published by the Company, allow rebates or bind the Company in any way beyond the written or printed procedures received from its officers." A. 1095 (emphasis in original); and A. 1069:

"Clearly" as the Board declared, "the business is the Company's directly; it does not belong to the debit

agent. The agent is not an independent contractor handling a debit over which he has sole control and from which he can exclude close supervision; he is an employee of the Company." 154 NLRB at 51, A. 1157; "Further, the business done by the agents belongs to the Company." *Id.* at 50, 1156.

5. Capital Investment and Risk.

No investment, no assumption of capital risk, is needed to become or to remain an agent for the Company. See, e.g., A. 157, 728. Indeed, there is no requirement that these agents make any expenditure of funds for any purpose. None was even claimed at the hearing, with the single exception of the initial license fees to the State of Maryland, as to which the estimates of the amounts involved ran from \$2.50 to \$10.00. A. 694, 728, 755, 811. Even this had not been required of the former Quaker City agents at the time they commenced their relationship with the Company. A. 26. The Company assumes the costs of license renewals. A. 811.

These agents have no overhead expenses and need have none. They need have no payroll; they need have no employees. In this particular unit, none of the agents has any employees or regular assistants. A. 148, 723, 788. In fact, Agency Vice President Rose told a meeting of many of the agents that it would be against the Company rules to have an outsider—one not licensed upon application of the Company to work for it—to do any collecting or any agent's work.. A. 220-223. In this particular unit, no one has been so licensed by the Company. A. 457.

Further, there is no requirement that any bond be paid for or provided by the agent. A. 71. Agent

Scott's testimony that "I have never paid any sort of bond whatsoever, on this form or any other", *ibid.*, is the only evidence of this record relating to bond expense.

As to postage expenses, the only regular and recurring expense appearing on this record is that involved in the return of receipted premium receipt books to policyholders who have mailed their payments to the Company. And this expense is concededly paid by the Company although the agents receive collection commissions as though they had personally collected them while working on their debits. A. 97-98, 540-541, 724-725. While there was a suggestion that some agents may mail out some arrearage notices at their own expense, A. 431-432, there is no suggestion that this is regular or significant, and *a fortiori* no suggestion that this is an expense required of the agents in order for them to maintain their positions with the Company.

As the Company has made all the capital investment required for this work, these agents assume no personal capital risk. Their only risk is that they will lose their job. They cannot lose any of their capital as they have invested none. As they do not purchase anything for resale, have no investment and no overhead expenses, the entire concept of profit is alien to this relationship, precisely as alien as it would be to any employer-employee relationship. Under all these circumstances, these agents are not "on their own." They are "on" the Company.

B. These Agents Do Not Have Any Means of Livelihood Other Than Their Jobs as Agents With the Company; They Have No Real Bargaining Power Vis-a-Vis the Company.

1. No Experience or Previous Training Required.

These agents, who do not operate their own businesses, cannot be considered on their own or independent, for the additional reason that they do not bring to this relationship any such independent training or skill as would enable them to make their livelihood independent of the Company. They are far removed from the typical picture of the lawyer or physician as independent contractor: one whose professional training and experience produces sufficient demand for his services so that one particular relationship is not vital to him. To the contrary, the hard fact is that these agents may be and are hired by the Company without any previous experience whatsoever in the insurance business. They are recruited by newspaper advertisements or the suggestions or references of other Company agents. A. 403.

2. The Company Trains the Agents in the Manner and Means of Doing Their Work.

The Company must train the agents in the manner and means whereby they shall do this work. This fact was aptly expressed as follows by Agent Von Saleski, who, after making clear he had had no previous experience or training in the insurance business, was relating how he came to be hired by the Company:

"I did inquire what kind of job it is, and he [the district manager] told me it is collecting and selling, mainly, and *he would furnish the tools and he would give me an instructor*, and we would go right in the middle of things and I would get a debit. An assistant manager would introduce me to the people so that I would get to know them

and they would get to know me. And *he would show me how to sell or how to solicit the people.*" A. 727 (emphasis added).

"In fact," the Board found, "the assistant manager is an important part of the assistance which Von Saleski testified he was promised when he was 'hired.' The furnishing of tools, such as the debit book and forms, office space for periodic meetings and services, an instructor while the agent is acquainting himself with the area, accounts, and work, with full earnings accruing to the agent since the assistant manager who instructs is otherwise compensated, is an element of employer-employee relationship. The agent, typically an employee, at this point invests only his time. The Company alone makes the investment in office space, materials, and instruction facilities as it trains him and supervises his work." 154 NLRB at 54, A. 1166.

The Company reserves and exercises the right to train any and all of these agents. The assistant manager admittedly has the duty of training new agents. A. 459. Further, the assistant manager or special writer obviously performs or can perform a training function as he wills when accompanying the older agents on their debits. Additionally, the weekly sales meetings perform a training function; they provide perhaps the most readily available vehicle for the Company to impose its views as the manner and means—the "how to"—of this work.

How to sell—the manner and means of selling—is the principal subject matter of these meetings. "You say to them 'Here is something in this policy which ought to be real salable. Point this out to the prospects and you will probably be able to sell this insurance.'" A. 530. The manager "may explain or has explained

on occasion some of the details of the particular policy, giving examples of how to approach a policyholder, what to say, how to overcome objections that the prospect may have * * * ." A. 129. A lot of the agents "maybe are not completely familiar with the complete approach, or the complete terms of the policy and, therefore, it is reviewed. In other words, we go over everything." A. 800. After the district-wide meeting, there are meetings by staffs. A. 131. "Many times the things that the manager had spoken about are reviewed by the assistant manager. He, again, reviews the staff record with the individual agents on that staff, and individual records of the agents on that staff, in detail." *Ibid.*

3. No Other Means of Livelihood.

It is clear that these agents rely upon their relationship with the Company for their livelihood. On this record, there is not to be found even any significant claim of outside employment. No agent testified who had in the past few months sold any insurance for any other company. While Agent Scott had done this before recent months, he had discontinued selling for other companies and would no longer do so. A. 91. Agent Spalding declared he had sold no casualty insurance since January, 1964. A. 868. The other agents indicated they had never been licensed by other insurance companies. A. 359, 744. Those who had been licensed by other insurance companies were apparently noted by the Company on some list, evidently not prepared in the regular course of business for purposes other than the hearing, which it said it would produce if it could find it; no such list was produced. A. 425, 454. In any event, the Company admitted, "We do not look with favor where we have the same prod-

uct to sell, that an agent would go out and place his business with another company." A. 411. On this entire record, including the various references and suggestions relating to the amounts of money which could be and were being earned by the agents, the fact is clear that these agents rely upon the Company for their living.

C. The Rates and Manner of Compensation Payment Are Determined and Controlled by the Company.

1. Rates of Compensation.

The rate of compensation received by these agents is dictated unilaterally by the Company. The basic provisions, the Agent's Commission Plan, A. 1051-1059, were determined and drafted at the home office of the Company and distributed to the various district offices, all without the participation of any agents. A. 490-494. The agents do not participate in the drafting of any of the terms of the Plan. A. 27. It is presented to the new agent for his signature; he has solely the option of signing or going to work somewhere else. A. 183, 185, 494. It is presented to him for signature not negotiation; as one agent testified, "The contract was a commission plan which I signed, and I did not help to create this commission plan." A. 711. There is no contracting as between independents or equals. As Agency Vice President Rose testified, "The change [to this Plan] was handled through the Board of Directors and the agency men [agency vice presidents, regional agency vice presidents] of the home office." A. 491. The decision having been made by the Company at its home office, "These commission plan booklets were forwarded out to the district managers * * * and the divisional and state and regional managers." A. 492.

Moreover, the Company amends the Plan in practice without formal amendments as it sees fit. Contribution towards travel or car expenses is not covered in the Plan, for example, but one of the agents testified, "The company allows me to take one percent of my total collections as car allowance." A. 358. The Company makes this allowance where, in its unilateral judgment, "an agent has a large territory that he covers and there might be those circumstances that would make an adjustment of his commissions feasible." A. 409, 617. Patently, the Company controls the amount of the contribution towards travel expenses, as well as the agents or debits to receive it. These changes are at all times subject to its control regardless of the Plan.

Further, the Company has unilaterally amended the Commission Plan by inaugurating in 1962 a "service award bonus." A. 475. This is in reality a vacation plan. The agent is permitted one week off after one year of service and two weeks after two years and is "paid for this period of time off, one week or two weeks, he is paid a percentage of the average of his commissions for the previous four weeks prior to this time off." A. 475. The assistant manager covers the debit while the agent is off, and the agent receives, in addition to the service award bonus, commissions on the sales made by the assistant manager. A. 476, 486. Whenever an agent is absent, whatever the reason, his assistant manager will endeavor to cover his debit and perform the required servicing. A. 418. In sum, as the Board found, "It does not appear that the assistant manager busies himself with matters other than those which relate to his agents. He announces at weekly meetings which agent he will accompany the following week, and he covers the agents' debits when they are

on vacation, the agent receiving his regular commission on the premiums collected and new business written by the assistant manager. * * * Through all of this the assistant manager who replaces the agent remains an employee of the Company; he is not an independent contractor." 154 NLRB at 53, A. 1164-1165.

2. Manner of Payment.

The Company reserves and exercises the right to control the mechanics of the payment of compensation to these agents. Specifically, the Company controls the extent to which they may retain their commissions from the collections which they make on behalf of the Company. The Company permits such retention in the case of industrial insurance but proscribes it in the case of ordinary insurance. In the latter case, the entire premium must be paid to the Company by the agent. A. 812. The agent may not withhold his commissions; the Company pays whatever commissions are involved, at a later date. A. 812-815. Should the Company at any time decide that this system shall be extended to all types of insurance and thus to terminate net remittances on every type of insurance, the Company patently has reserved full right to effectuate its will in this respect.

Moreover, when it permits retention of commissions, the Company closely reviews and controls the amounts which are retained. The Agent's Commission Plan which the agents must execute itself expressly provides, "The Company reserves the right to conform commission payments to the agent in accordance with the true condition of his account and records." A. 1058; see also *id.* at 1053. In any event, the Company clearly reserves such right, for it actively exercises

it in practice by means of a weekly review of the agents' deposits and accounts. The forms provide for inspection or approval by the superintendent or assistant manager. A. 1060, 1062, 1064. In regular routine, these forms are presented by the agents in person to their assistant managers, who check them, prior to the agents' turning in their deposits. This provides immediate and direct review of the amounts which are retained by the agent. As Agent Scott testified:

"When this [the weekly accounting form, A. 1060-1061] is complete, I sign it, submit it to my assistant manager, who is always located in the same location in the district where I report, and he checks it over, *checks it to see that I have not drawn too much money in my commissions.* * * *

In other words, he inspects it and okays it by signing his name on there. Once it has been okayed, I am then permitted to go down to the company cashier and submit it along with the monies that I have collected that week." A. 55 (emphasis added).

What is significant about the manner in which the agents are paid is this direct and immediate review in every case of the amount retained by the agent as his compensation. That amount is subject to the control of the Company; if errors are detected, they are immediately corrected, and, as we have seen, corrected as the Company determines.

The type and form of money deposit and accounting is dictated by the Company. At the time of this particular hearing and the making of this particular record—and the Company obviously reserves the right to modify or supersede this at any time:

"Every 13 weeks is an audit of the debit, and we don't turn in necessarily the amount of cash that

we collected that particular week, but the amount of money that the audit calls for, which may be a few dollars less or a few dollars more, depending on any errors or anything that we may have encountered in the past 13 weeks. * * * This particular week that this is done the company insists that we do not settle by cash, that is, the exact amount of money that we may have collected in that particular week, but they insist that we settle in accordance with the true accounting." A. 57, 56.

The timing of the deposits is not left to the discretion of the agent, except that he may make them more frequently than the Company requires; he cannot make them less frequently than the Company requires. He must make them "promptly." A. 1058-1059. He must make them weekly or biweekly, as required by the reporting enforced in his district by the Company.

In general, as found by the Board, "While the Company does not fix an agent's hours for debit collections and other services on his debit, this work must generally be fully attended to each week; the agent must periodically reach his policyholders * * *, see that the payments which they owe to the Company are maintained, and turn in to the Company each week the money which he has thus collected or otherwise received, less any sums due him by the Company or to be credited to him." 154 NLRB at 46, A. 1143.

D. The Company Reserves and Exercises the Right to Fire These Agents.

"If any agent believes he has the power to make his own rules and plans of handling the company's business then that agent should hand in his resignation at once. * * * If we learn that said agent is not going to operate in accordance with the company's

plan, then the company will be forced to take the agent's final." A. 609-610, 1120. These words, which were read in many of the districts to which these agents are assigned, A. 610, expressly and ineradicably demonstrate the Company's reservation of the right to control the manner and means of the agents' job, and to fire—"final"—any agent who attempts to stand on his own in relation to the Company's control. These words were contained in a letter signed by the Chairman of the Board of the Company. A. 690-692, 1120. Their meaning and force is not one whit attenuated by their general context of a dispute between the Company and the Union, nor by their grammatical context in the letter, A. 1120, in a single sentence commencing with a reference to lapses. The reference could have been to any other thing, any aspect of the means and manner of the work of these agents; the choice of directing it to lapses this time was obviously the Company's and the Company's alone.

It is unmistakably clear, in both the general and the grammatical contexts, that the thought expressed is definitely not limited to lapses or any particular phase of the business. The thought expressed is comprehensive and absolute. In general, the evident purpose is to show the Union agents who is boss, not to declaim on lapses. A parsing of the sentence shows that the words quoted are independent of the introductory phrase. In any event, even if this particular instance is considered limited to lapses this communique of the Company provides eloquent and irrefutable proof of the *reservation* by the Company of the right to fire an agent for causes of the Company's unilateral selection. It may be lapses today, but it can and will be any issue tomorrow which the Company will select

as another occasion for again notifying the agents that *it is in control, and that it reserves the right to fire any agent who does not conform strictly to its control.*

The quoted words also illustrate the semantic preference of the Company in describing its terminating an agent, a preference for "resignation" rather than "firing" or "discharge." The end result is of course identical: the agent no longer has his job. While the first sentence quoted ends the "agent should hand in his resignation at once," the second drives the intended and expressed meaning home so that it cannot possibly be misunderstood, "the company will be forced to take the agent's final." If an agent is requested to hand in his resignation, the implicit or explicit premise necessarily is that he will be fired if he does not. Whenever the Company asks for a resignation, it obviously, and to the agent's knowledge, is reserving—and will exercise—the right to take the agent's final, to fire him, if there is no resignation. The words may be different, but the tune remains the same: it is a dirge for the continuation of the agent's relationship with the Company. As the Board stated, "Whether the terminology be of discharge, encouragement to leave, or resignation, control and employees status are clear: the agent is effectively 'dead' in any event." 154 NLRB at 45, A. 1142.

Agents are asked for their resignation whenever the Company, in its own lights, finds their performance inadequate. It is the manager's job "to see that the district makes production," A. 594; and if some agent does not contribute as the Company believes he should, to get rid of him. In one case, for example, Divisional Manager Formwalt testified he "made it clear" that

if the particular agent "did not improve his record so far as production goes, increase in condition of account, that I think it would be better for the man to maybe try some other type of business because he just was *not doing as well as we expected.*" A. 599 (emphasis added). In another case, the manager asked Formwalt for permission to bring about a parting of the ways between the agent and the Company because "the man was doing so poorly, and we had tried to help the man, assist the man, *the assistant manager going with him, and Mr. Kropf [the district manager], himself, had been out with Mr. Gore [the agent], and Mr. Gore had not really shown any improvement. This is after a couple of months had passed. In fact, Mr. Gore's record was getting poorer—.*" A. 591 (emphasis added). This pattern was repeated in other cases. A. 567-568, 595.

By its right of termination the Company controls the details, the manner and means, of the agents' performance of their jobs, exactly as does any other employer which acknowledges it is an employer. The Company admittedly controls, for example, how frequently the agent visits his policyholders. Agency Vice President Rose made it clear that the Company would fire an agent who did not visit his policyholders "over a long period of time, an unreasonable period of time." A. 442. He made clear, however, there was no requirement that the agent visit his policyholders every week; and he was asked where the line would be drawn. The reply was as follows:

"This would have to depend upon circumstances and the condition of this man's policyholders. I might say that there are some agents who collect their premiums in advance. They could possibly

be off two weeks and it wouldn't affect them a great deal. Other agents who are not as good operators or who do not take care of their business as well as they should—maybe the second week would affect their policyholders to a great extent and we would consider that as a reason for termination. This is an undeterminable situation, depending upon each individual involved." A. 442-443.

Manifestly, the Company reserves the right to determine what is a reasonable period of time for visiting the policyholders on a particular debit, and to fire agents who do not visit policyholders as frequently as the Company believes they should. If an agent did not visit his policyholders frequently enough, in the Company's view, if he did not service the policyholders in a manner satisfactory to the Company, that would be a matter of concern to all levels of the Company's management, from the assistant manager, up through the district manager, division manager, state manager, or regional manager, and in a sufficiently serious case, to the Agency Vice President himself. A. 442-443.

These agents recognize that the means and standards are defined and enforced by the Company. Even the agents called as witnesses by the Company found themselves admitting this. Agent Von Saleski, for example, conceded, "I must make the calls, yes", as provided in the debit book. A. 700. He testified also that the Company considers an agent's sales production poor if it falls below \$26 increase in the year to date; and that the Company would assist the agent if he fell below that standard. A. 743-744. The assistance, as always, would necessarily be in the manner and the means of the performance; the assistance would

be in selling and how to sell so that the results could be improved. As to the means and manner by which the collection function had to be fulfilled, Von Saleski stated as follows, "They don't require it, but they expect it. * * * They expect a minimum amount, I believe, of about 90 percent * * *." A. 750.

In the real world, there is no difference whatever between an employer's *requiring* a certain manner or standard of performance and his *expecting* it. Disappointing an employer's expectations will propel an employee down the road to discharge just as swiftly and surely as falling short of the employer's requirements. Expectations and requirements are both standards—prescriptions of the manner and means of doing the agents' work—which these agents must fulfill to keep their jobs with the Company.

"It is required" Agent Rock conceded, "to collect the debit." A. 771. These agents are supposed to, and do, collect from each policyholder when the premium is due. A. 829.

Further, as Agent Scott testified, "we are expected to try to write new business every week." A. 286. The Company "expects the agent to maintain his debit, the debit assigned to him, in an orderly, businesslike manner * * *." A. 236. It virtually goes without saying that it is the Company which defines, and certainly reserves the right to define and redefine, what is "an orderly, businesslike manner."

The very function of management is to keep check on the manner in which the agents do their work. That is the purpose of requiring the agents to make weekly reports and to turn those reports in to their assistant managers for review and approval.

What the assistant managers do, according to Agency Vice President Rose, is:

" * * * check the reports when they come in on the day that the agent reports. * * * The agent keeps track on his account form of his yearly collections, of his weekly collections, his yearly collections, the amount of new business that he has issued, the lapses that come down. All this is prepared by the agent. Certainly as assistant manager, when looking this over—well, there is an arrears percent, determining how much of this business is in arrears, or the percentage in arrears. All of these things are factors which would indicate whether this agent is taking care of his business as he should be." A. 444.

E. Other Pertinent Facts.

1. Company Control Over Transfers and Lapses of Insurance Policies.

These agents are not free to transfer policies in their discretion; the Company has prescribed how such transfers shall be made, and it plainly reserves, for it has exercised, the right to approve or disapprove particular cases.

A proposed transfer "must be approved by the assistant manager or, as the form shows, the superintendent, of the agent who is to receive the transfer."

A. 74. The Company's Transfer Policy Schedule form shows a blank for the signature of the management representative, approving the transfer. A. 1065. The plain fact is that without the Company's approval, no agent is permitted to transfer, exchange, sell or assign his debit. A. 148. On the receiving as well as the transmitting end, the agent has no discretion. He must accept the business if the assistant manager tells

him that the business has been transferred to him; the agent is not free to decide for himself whether or not to accept the transfer. A. 138-139.

The case involving Agent Jenkins illustrates and demonstrates the reservation of control by the Company. He had arranged with another agent for business to be transferred to him; but his assistant manager did not approve—and the business was not transferred. A. 359-362. Agent Jenkins asked his assistant manager what happened, and the assistant manager replied, "Well, I gave it to Mr. Tregesser [another agent]. * * * The reason I gave it to Mr. Tregesser is he has a small debit and I am trying to build it up." A. 361, 362. Agent Jenkins testified he made objection to his assistant manager about this transfer: "I informed him that I had an agreement with the man who accepted the transfer, and I thought that this would prevail. * * * [But] he said he gave it to Mr. Tregesser because he wanted to build his debit up." A. 376.

This one case is sufficient to refute any Company claim that it does not retain any control over transfers. Divisional Manager Formwalt, for example, testified that the agents may transfer business at will, A. 510; but when this Jenkins case was brought to his attention, he said he would be talking to the assistant manager so that transfers would be permitted in the future. A. 512, 513. Such testimony emphasizes only that the Company can give instructions one way as well as the opposite way. The extent to which agents may transfer or accept business is under the control of the Company. As the Board found, "Even if instances can be cited of transfer of a policyholder

from one agent to another without approval by the company supervisor * * *, many approvals and some disapprovals, in other instances indicate the Company's right to exercise authority. Despite the efforts to show independence in connection with transfers, the Company's control and the agents' lack of authority are clear: Company approval must be obtained, and the transfer forms so indicate." 154 NLRB at 52, A. 1160.

The same is true of the lapsing of business. The agent's manager must sign the lapse form, A. 82, the Lapsed Policy Schedule, on the line for the signature of the "Superintendent." A. 1066, 1067. The agent turns the form in to his own assistant manager. A. 83. Detailed rules as to lapses are promulgated by the Company. Some of these relate to the time within which lapsed cases must be reported or may be collected. According to Agent Scott,

"If I make a collection on a particular policy, the policy in question, before the expiration of the grace period, which would be the following Monday, I am permitted to either call the office or come in—call the office and ask the girls in the office to remove said policy from the lapse sheet, or I may come in and do it myself. * * * However, if other lapses develop between Thursday morning when I report and Tuesday afternoon at 2 o'clock, which is the deadline for submitting of ruling of lapse, I may submit an additional piece of business for lapse." A. 82-83.

Other rules established by the Company relate to when the page relating to the lapsed policy may be removed from the agent's debit book. "The rule that we have been told from management is that when a case has

lapsed in our book, this particular page that has been lapsed is to stay in our book for thirteen weeks for this after it has been lapsed." A. 362. The agent has no reason of his own to do this; he does it solely because the Company has told him to do it. A. 377-378.

2. The Continuation of the Quaker City Relationship.

The issue at bar concerns exclusively the relationship between these agents and the Company. Any other relationship is not directly relevant, whether it be the relationship between the Company and some other type of agent or organization,² or the relationship between some of these agents—those reporting to the Franklin Street Office when the Company took over—and their former employer, Quaker City. The latter relationship, which admittedly was one of employer-employee, may assume some relevance, however, to the extent that it has been continued by the Company.

The record shows that there has been such continuation in significant respects. With respect to the vital relationship between agents and their assistant managers, for example, Divisional Manager Formwalt testified that all personnel are carrying on as they did in Quaker City. A. 563. He has given no instructions since the Company took over with respect, for example, to assistant managers' accompanying agents on the debit, because the relationship under Quaker

² On this basis the Trial Examiner rejected evidence the Company proffered with respect to a general agency organization it was utilizing in Maryland. 154 NLRB at 40-42, A. 1127-1132. He likewise held that the status of the Quaker City agents vis-a-vis Quaker City was irrelevant. *Id.* at 43, 1134.

City had been satisfactory and acceptable. A. 565. Further, he testified that the reporting system had not basically changed since the days of Quaker City. A. 537-538. Accordingly, it could well be found that the employer-employee relationship which formerly existed is now characteristic of the relationship between these agents and the Company. The changes in fact made by the Company have not been so significant as to require or support any finding that they have become transformed into independent contractors.

Moreover, to the extent that changes have been made, they have been made at the Company's unilateral direction and control. Indeed, the very manner and means which the Company claims it utilized in transforming these agents into independent contractors demonstrates the closeness and severity of control exercised by the Company. To put agents truly on their own, nothing more is needed than to leave them on their own. In particular, for example, it would have been significant, when the changeover from Quaker City was effectuated, if the Company had withdrawn the administrative hierarchy, the requirement of physical reporting, the scrutiny of the reports, the right to fire, and the regular meetings, which were the principal characteristics of the relationship with Quaker City which rendered that relationship one of employer-employee.

In fact, the Company embarked in the opposite direction. The demonstration of this is the direct testimony of Agency Vice President Rose, when he was asserting the legal conclusion that the agents were considered independent contractors and that the Company

did not control their work. The testimony then proceeded as follows:

"Q. How do you go about effectuating this policy in the area involved?

"A. Starting from myself, through the various positions that I have quoted previously, *we conduct meetings*. We have managers meetings, assistant managers, have the agents, if they do desire, attend these meetings to project this idea of an independent contractor and the lack of control that they operate under.

"Q. What over-all instructions do you give, if any, to your management people with respect to carrying out this objective or policy?

"A. We are constantly giving them instructions verbally." A. 403 (emphasis added).

The Company doth protest too much. Constant instructions in meetings are antithetical to lack of control and independence. Instructions in meetings are obviously means for asserting and exercising control. Actions speak louder than words.

Divisional Manager Formwalt testified that his superior told him, with respect to the former Quaker City agents, "they would be on their own, they are in business for themselves, and that I would have to try to relay this to the men." A. 498. This cannot be relayed with words; it has to be communicated and effectuated, if at all, in conduct and action. Whatever the Company preaching about being on their own, these agents could not misunderstand that the Company practice is one of control, when there is an administrative hierarchy above them, assistant managers, district managers and the rest of the retinue, imposing and enforcing requirements upon them to report regularly, to be physically accompanied by their su-

pervisors as they go about their work at any time, to be subject to checks and reviews of their work, subject always to the right to fire and all the other rights reserved by the Company which have been noted above.

It merits emphasis that the record demonstrates that the controls exercised and asserted by the Company are identical and uniform throughout the entire unit. There is no basis whatever on this record for distinguishing the agents who reported at Franklin Street from those who reported at St. Paul Street. There are perhaps some assertions of variation between these two groups. In large if not complete part, these assertions cannot be credited as factual, but must be rejected as reflecting only the special motivation and semantics of those whose overweening purpose and motivation is to defeat Union organization by having this case result in a finding of independent contractor. In any event, to the extent that assertions of variation are to be credited, the variations manifestly reflect the choice and control of the Company. What is enforced and prevailing at any one Company office can be enforced and made prevailing in some or all other Company offices, at the Company's election. If there are variations, therefore, they merely serve to confirm the reservation and exercise of that control which militates for the conclusion that these agents are employees.

Moreover, this particular record makes clear that the Quaker City agents, who had acted together as a Union before the Company took over, have continued to do so thereafter. Agent Scott has acted as the collective spokesman for these agents with the Company. It is clear that these agents have engaged in some concerted activities typical of employees.

To the extent they have had any results, the means has been *collective* action. Collective action—in fact as well as by definition—is the antonym of individual action. Individual action could and would have been taken if these agents were really *independent* contractors. Their record of collective action is thus a factor demonstrating that these agents are not independent contractors but employees.

3. Company Payment of Social Security Taxes.

While the Company has determined it will not withhold federal income taxes on account of these agents or make state workmen's compensation or unemployment compensation payments, it does make social security tax payments for these agents as an employer. A. 704, 884-891, 923-925. The admission that these agents fall within the pertinent statutory provisions evidences that the conditions required by them are in fact characteristic of these agents.

Section 7701(a)(20) of Title 26, U.S.C., provides in pertinent part, "the term 'employee' shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21," which embraces Section 3121(d). The pertinent text of the latter provision, which is set out in the footnote,³ re-

³"(d) Employee.—For purposes of this chapter, the term 'employee' means—* * *

"(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

"(3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—* * *

"(B) as a full-time life insurance salesman; * * * if the contract of service contemplates that substantially all of such services are

quires that to be covered by the law, these agents must either be employees under the usual common law rules under subsection (2) or fulfill the requirements of subsection (3). The latter, in turn, imposes certain requirements which are at variance with any claim that these agents are independent contractors.

Subsection (3) requires, first, that "substantially all of such services are to be performed personally by such individual." To acknowledge that this requirement has been satisfied is to recognize that these agents may not and do not have assistants in any significant sense, and that salaries to assistants for these agents is not any genuine or significant factor in this case. If these agents had any assistants or employees, or if it was contemplated that any assistants or employees would perform any significant part of the services which these agents perform for the Company, this statutory requirement could not possibly be met, and there could be no Company Social Security contributions for these agents.

Moreover, an individual cannot qualify as an "employee" under the statute if he "has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation)." This provides corroboration to the critical fact, already discussed herein, that these agents

to be performed personally by such individual; except that an individual shall not be included in the term 'employee' under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed."

have made no investment in the facilities which they use.

Further, an individual cannot qualify as an "employee" within 3121(d)(3)(B) if his services "are in the nature of a single transaction not part of a continuing relationship." As to this, the Company concedes that it makes every effort to encourage length of service and a continuing relationship.

In short, the circumstances required for being an "employee" under this particular statute are similar to those for "employee" ordinarily and are true of these agents.

SUMMARY OF ARGUMENT

I

A. The legal category of "independent contractor" was created in the common law to insulate the master from tort liability for wrongful conduct in the course of work done for him by one who was pursuing a separate and independent calling or business. From its very inception the legal category of "independent contractor" included as a vital element the pursuit of an independent business separate and apart from the business organization and operations of the master. Historically, as the concept developed in the law, this characteristic of independent entrepreneurship, which was the factual explanation of the lack of right of control in the master over the work of the independent contractor, became and is most frequently expressed as a "right of control" test; so that the typical statement of the distinction between "employee" and "independent contractor" is whether the master retains the right of control over the work involved.

The concept of "independent merchant", one who depends upon profits—the difference between what he pays for goods, materials and labor and what he receives from the prices he charges—as opposed to one who makes his living from wages or salaries and is an integral part of the employer's organization, was in the mind of Congress when it added the express exception for "independent contractor" to the definition of "employee" in Section 2(3) of the Act. This amendment was a Congressional reaction to the decision of this Court, *Board v. Hearst Publications*, 322 U.S. 111 (1944), in which the Court had relied primarily upon the purposes of the Act, and, according to the belief of Congress, had disregarded the ordinary standards of the law of agency.

In its consideration of "independent contractor" in various contexts, this Court has considered the realities of the work relationship and of the consequent right of control. This Court has relied on such factors as whether the workers involved were in fact operating their own independent businesses or were a part of the employer's organization and operations.

B. These agents must be held to be "employees" under any applicable legal test. They are not engaged in their own distinct calling or business, but, rather are an integral element of the Company's organization and business. They have no real bargaining power vis-a-vis the Company. They are not independent merchants. The concept of "profits" is inapposite to their operations: they have no required expenses, they do not buy or sell or own any products, they make no capital investment and have no attributes of an independent profit-making enterprise.

Under the tests of the law of agency, these insurance agents are employees. The Company does retain a right of control over their physical conduct in their work, and exercises that right in present practice by assigning a supervisor to accompany these agents as they work on their debits and by requiring them to report to their district office to which they are assigned one morning each week. Generally, the work of debit insurance agents is done by employees and not independent contractors. There is no particular experience or education required and the Company provides the necessary training to the new agents in how the work shall be done. All the instrumentalities of the work, such as the business office, the insurance policies themselves, the forms and the accumulated policyholders on the debits, are provided by the Company. The agents are full-time employees and the Company shows its interest in retaining them by providing incentives for length of service. The work performed is in the regular business of the Company.

II.

A. The Court below misconceived the scope of review open to it under the Act. It failed to recognize that the issue of employee status is essentially one of fact. It believed itself free to follow its own evaluation of the record, without according to the Board any deference for its administrative expertise in applying statutory terms to particular facts. The Court seemed to believe that the test was whether it could find any evidence in the record to reverse the Board rather than the normal test of upholding the Board if there is substantial evidence of the whole record supporting the Board.

B. The Court below misconceived the "right of control" test. It derogated many of the evidences of control upon which the Board had relied, with the assertion that the controls were inherent in the nature of the insurance business. But the right of control test is concerned with whether or not evidences of the right of control exist; the reasons therefor are irrelevant. If the nature of the employer's work is so detailed and integrated that he must retain extensive controls over it, that factor can hardly be disregarded in the law; rather, it is conclusive proof that the relationship must be one of employer-employee. Accordingly, the judgment of the Court below cannot be sustained. The Board's Order is amply sustained by substantial evidence and is entitled to enforcement.

ARGUMENT

I. THESE INSURANCE AGENTS MUST BE LEGALLY CATEGORIZED AS "EMPLOYEES".

A. Applicable Legal Standards.

1. "Independent Contractor" in the common law.

The concept of "independent contractor" came into the common law as an exception to the rule which had been developed that a master was liable to a third party for the negligence of his servant. Its earliest clear expression may be found in *Milligan v. Wedge*, 12 Ad. & E. 737, 741-742, 10 L.J.Q. B. 19, 113 Eng. Rep. 993, 994, 995 (1840), which held that one who "has employed another who is recognized by the law as exercising a distinct calling" (Lord Denman, C. J.) is not liable to a third party on account of the torts of a person he has employed—"For, where the person who does the injury exercises an independent employment, the party employing him is clearly not liable." (Williams,

J.); *accord*, *Quarman v. Burnett*, 6 M. & W. 499, 511, 151 Eng. Rep. 509, 514 (1840) in which liability was likewise denied for torts committed by those "who are not the servants of the owners, but who exercise employments on their own account." (Baron Parke); *cf.* *Laugher v. Pointer*, 5 B. & C. 547, 108 Eng. Rep. 204 (1826), in which opinion was divided; and *Bush v. Steinman*, 1 B. & P. 404, 126 Eng. Rep. 978 (1799), holding that the master was liable for the torts of a servant of one whom the master had engaged to perform a service. As it came into existence, the concept of independent contractor included the element that the independent contractor would be regularly engaged in an *independent* business or calling. Leidy, "Salesmen As Independent Contractors," 28 Mich. L. Rev. 365, 370 (1930).

"The independent contractor, conceived as someone engaged in a *separate and independent calling* and exercising that calling while producing an agreed result for the employer, actually did stand in a different conceptual relation to the employer than did the ordinary servant or employee. The difference was that he was in the pursuit of his calling and for this reason the employer did not have control as to the manner of performance. The independent contractor was in what we have called an '*own business*' relationship." Wolfe, "Determination of Employer-Employee Relationships In Social Legislation," 41 Colum. L. Rev. 1015, 1022 (1941) (emphasis added).⁴

As the law developed, however, the routine judicial reference to the ultimate legal criterion was not to the

⁴ See, generally, in addition to the articles cited in the text, *Hilliard v. Richardson*, 3 Gray (69 Mass.) 349 (1855); Harper, "The Basis of the Immunity of an Employer of an Independent Contractor," 10 Ind. L. J. 494 (1935); Jacobs, "Are 'Independent Contractors' Really Independent?", 3 De Paul L. Rev. 23 (1953).

"own business" or "independent calling" which produced the lack of right in the master of such control as he would have over a servant, but to the "right of control" conclusion itself. Accordingly, "right of control" has for many years been the capsule statement of the justification for deciding whether or not to hold the master liable for torts committed in doing work he has ordered, and in more recent years, for deciding whether the employer-employee relationship existed for other purposes such as unemployment compensation statutes and similar social or labor legislation. If the ultimate master retained the "right of control" over the work in issue, he was legally the "master" or "employer" and those performing the work were "servants" or "employees". If the ultimate master did not retain the "right of control", those performing the work were categorized as "independent contractors". As this Court stated in *Singer Manufacturing Co. v. Rahn*, 132 U.S. 518, 523 (1889),

"the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' *Railroad Co. v. Hanning*, 15 Wall. 649, 656."

While the "right to control" concept has been frequently repeated, analysis reveals it to be less a test or means for arriving at the ultimate legal judgment than a summary expression of the result itself. Analytically, the statement that the relationship hinges upon the right to control provides no guidance as to the facts or considerations which are pertinent to determining whether that right has been retained. That determination, in turn, depends upon the finding of

facts and the appraisal of the relevancy and relative weight of each fact and fact cluster. The control test thus "seems to fit itself too readily into an *ex post facto* determination of a relationship. * * * In view of the fact that, relationship once determined, control would follow, as an implication of law, the possibility of reasoning in a vicious circle is apparent." Leidy, *op. cit. supra*, at 377-378. The difficulties with the right of control test arise from "the vagueness of the test, resulting both from the lack of agreement or rules on the weight given to various features of the relation, and from the fact that the right of control is itself an inference or conclusion, seldom capable of direct proof." 1A Larson, *The Law of Workmen's Compensation* 657 (1966).

2. "Independent Contractor" in Section 2(3) of the Act.

The original text of the National Labor Relations Act, as it became law in 1935, provided coverage and protection only for those who were "employees". There was no explicit exception for "independent contractors". However, the Board recognized the truism that one who is an "independent contractor" *ipso facto* cannot be an "employee". See, e.g., *Twentieth Century-Fox Film Corp.*, 32 NLRB 717, 732-735 (1941), and cases cited therein; *Philadelphia Record Company*, 69 NLRB 1232 (1946).

This Court considered the issue in *Board v. Hearst Publications*, 322 U.S. 111 (1944). The Board had found that the newsboys involved were employees; the Court of Appeals had reversed and declared them to be independent contractors. This Court addressed itself at the outset to the contention that "common-law standards" must be the only basis for decision; and

rejected that contention principally on the ground that Congress had not intended that the legal coverage of the Act could vary according to the common law of each individual state, but had provided a labor law uniformly effective throughout the nation. *Id.* at 120-124. In his dissent, Mr. Justice Roberts did not dispute this conclusion, but contended, "As a result of common law development, many prescriptions of federal statutes take on meaning which is uniformly ascribed to them by the federal courts, irrespective of local variance." *Id.* at 136. The Court then primarily considered the "history, terms and purposes of the legislation", *id.* at 124, and the fact that the enforcement and adjudication under the Act had been assigned to an expert Board, *id.* at 130-132, as the foundation for its judgment that the newsboys were employees.

The *Hearst* decision triggered a Congressional reaction, when the Labor Management Relations Act was enacted in 1947, resulting in the addition of an explicit exception for "independent contractor" in Section 2(3) of the Act. "The effect of this provision was to overrule *Labor Board v. Hearst Publications*, 322 U.S. 111." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481, n. 10 (1964).

According to the Report of the House Committee on Education and Labor, the *Hearst* case involved "independent merchants". H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 18, as reprinted in *Legislative History of the Labor Management Relations Act, 1947*, 309 (1948). These independent merchants "bought newspapers from the publisher and hired people to sell them * * *." *Ibid.* This Report continued:

"In the law, there has always been a difference, and a big difference, between 'employees' and 'in-

dependent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive from the end result, that is, upon profits." *Ibid.*

According to the Conference Report, *Hearst* "held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act. Consequently it [this Court] refused to consider the question of whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law independent contractors." House Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 32-33, *id.* at 536-537.

Clearly, all that Congress objected to was what it described as the Court's completely ignoring ordinary legal tests. Congress hardly intended that any issue of employee-independent contractor under the Act should be determined without any reference to the purposes of the Act—so long as the ordinary legal tests were also considered. It is noteworthy that the Court of Appeals decision in the *Hearst* case, which Congress obviously approved, defined the criterion it applied as follows:

"Since the term employee is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments. Such a result is in accord with the basic

theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense unless that sense is contradicted by the context of a statute." *Hearst Publications v. National Labor Relations Board*, 136 F.2d 608, 612 (9 Cir. 1943) (emphasis added).

3. "Independent Contractor" in the decisions of this Court.

This Court has emphasized that the determination of employee or independent contractor should reflect consideration of the realities of the work relationship involved and of the consequent right of control in the light of the particular issue before the Court. In *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 32 (1961), for example, the Court upheld an administrative determination that the members of a cooperative were "employees" of the cooperative for the purposes of the Fair Labor Standards Act; and relied essentially upon the following factors:

"The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates. Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers." *Id.* at 32-33 (footnotes omitted).

In *United States v. Silk*, 331 U.S. 704 (1947), involving the Social Security Act, the Court similarly relied on the realities of the work relationship involved.

In holding that certain of the driver-owners were independent contractors, the Court held that "where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." *Id.* at 719 (footnote omitted).

In holding the unloaders to be employees, this Court pointed out:

"They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business." *Id.* at 717-718.

B. These Agents Are "Employees" in Accordance With the Applicable Legal Standards.

1. Common Law.

These agents must be held to be "employees" under any applicable legal standard. They are not engaged in their own distinct calling or business. Quite the reverse, they are an integral element in the Company's organization and hierarchy. They are not in an "own business" relationship but are in the Company's business, dealing with the Company's policies, reporting to the Company's assistant managers and managers, and generally subject to the Company's rules and phys-

ical supervision. The Company retains the right of control not only over what shall be done but how it shall be done.

2. Congressional Statements.

These agents are not "independent merchants." They do not buy any products for resale on their own account. They never have title to or dominion over the Company's insurance policies. They hire no people to sell those policies. They work for commission salaries under direct supervision. They do not do a job for a price, but devote full time to the Company's work and depend upon their job as agent with the Company for their livelihood. As they have no expenses for goods, material or labor, or any required expenses whatever for that matter, the entire concept of "profits" is utterly inapposite.

3. Law of Agency.

These agents are employees under the ordinary tests of the law of agency. As they appear in the *Restatement*,⁵ those tests would focus principally upon the following matters of fact:

⁵ "§ 220. Definition of 'Servant

"(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

"(b) whether or not the one employed is engaged in a distinct occupation or business;

"(c) the kind of occupation, with reference to whether,

a. *Extent Of Control.* Most of the facts of record in this case evidence that the actual understanding and agreement, as it is routinely practiced in real life by these agents on the one hand and the Company on the other, clearly lodge the right of control over the details of the agents' work with the Company.⁶ The Company does retain a right of control over the physical conduct of the agents in the performance of the services which they render the Company (pp. 11-19, *supra*). None of these agents "has the power to make his own rules and plans of handling the Company's business" and must "operate in accordance with the Company's plans." A. 609-610, 1120, pp. 29-30,

in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer;

"(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business."

Restatement of the Law of Agency 2d 485-486 (1958) (hereinafter cited as "*Restatement*").

⁶ According to the *Restatement*, "the control or right to control needed to establish the relation of master and servant may be very attenuated. In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking." *Id.* at 847.

supra. The only written agreement between the parties is the Agent's Commission Plan, A. 1051-1059, which was drafted and is subject to change by the Company unilaterally (pp. 25-27, *supra*). The Company provides each of these agents with a Rate Book which consists of controls over the details of their work. A. 1068-1096.

b. *Distinct Occupation or Business*. If there is one thing that emerges unmistakably clear from this record, it is that these agents are not engaged in a distinct calling or business of their own, apart from the Company, but are, rather, engaged in the occupation, calling or business of the Company.

c. *How Work Is Usually Done*. The occupation of debit agent is usually done under the direction of an employer in a relationship viewed by the law as employer-employee. This is demonstrated by common law decisions, decisions of the Board and studies of the insurance industry.

In *Chatelain v. Thackeray*, 98 Utah 525, 534, 543, 548, 100 P.2d 191, 195, 199, 201 (1940), for example, holding an insurance company vicariously liable in tort for the negligence of one of its debit agents, the Court found that the agent "was at liberty to go anywhere, at any time, and by what means he pleased, to sell insurance. Being paid upon a commission basis, however, it was to his interest and to the interest of appellant [the insurance company] for him to sell as many policies as possible. * * * It is to be noted in this connection [in applying the right of control test] that it is not actual interference in the work that denotes the agency, it is the right to interfere that makes the difference between an independent contractor and a servant or agent. * * * Neither the fact that [the agent]

was paid solely upon a commission basis, nor that he used his own automobile and personally paid the expenses of the operation thereof, is controlling in determining when the relationship of employee exists." Accord: *Atlanta Life Insurance Company v. Stanley*, 276 Ala. 642, 165 So.2d 731 (1964); *Richards v. Metropolitan Life Ins. Co.*, 19 Cal. 2d 236, 120 P.2d 650 (1941); *Dillon v. Prudential Ins. Co. of America*, 75 Cal. App. 266, 242 Pac. 736 (1925); *Martin v. State Farm Mutual Automobile Ins. Co.*, 108 So.2d 21 (Ct. App. La. 1958); *Gillespie v. Ford*, 225 S.C. 104, 81 S.E.2d 44 (1954); *Fidelity Union Life Ins. Co. v. McGinnis*, 62 S.W.2d 186 (Civ.App. Tex. 1933); cases holding insurance agents to be "employees" under statutes include: *Industrial Com. v. Northwestern Co.*, 103 Colo. 550, 88 P.2d 560 (1939); *Review Board of U. Comp., etc. v. Mammoth L. & A. Ins. Co.*, 111 Ind. App. 660, 42 N.E.2d 379 (1942); *Unemployment Compensation Com. v. Ins. Co.*, 215 N.C. 479, 2 S.E.2d 584 (1939); *Superior Life, & c., Co. v. Board of Review, & c.*, 127 N.J.L. 537, 23 A.2d 806 (1942); *Superior Ins. Co., Ap., v. Unemp. Comp. Bd.*, 148 Pa. Super. 307, 25 A.2d 88 (1942); *Carter's Deps. v. Pal. St. Ins. Co.*, 209 S.C. 67, 38 S.E.2d 905 (1946); *Life & Casualty Co. v. U.C.C.*, 178 Va. 46, 16 S.E.2d 357 (1941).

The decision below cannot be reconciled with the following analysis in *Capital Life & Health Ins. Co. v. Bowers*, 186 F.2d 943, 945 (4 Cir. 1951) (footnotes omitted):

"The contention is that the agents were not employees of the company but had the status of independent contractors at common law, in that they were free from the control of the company in doing the work for which they were paid. It is pointed out that the commission agents were not

required to report to the office daily and that although they were expected to collect the premiums in the area assigned to them, and also to write new business to offset lapsed policies, they were free to go to work when they pleased and to write new business when and where they pleased, in or outside that area. It is urged in short that they were subject to no requirements except to be honest and accurate and to conduct themselves in accordance with the law of South Carolina, and that therefore they have that freedom of action which characterizes the status of an independent contractor and is illustrated in numerous cases.

"There are similarities in certain respects between the facts of these cases and the facts of the case at bar, but when all the circumstances of the present controversy are examined, it becomes obvious that the seeming freedom from control of the commission agents is lacking in reality, and that they are in fact as completely subject in all material respects to company direction as the salaried agents whose employee status under the statute is not questioned. Long experience of the taxpayer and other companies in this field has resulted in the adoption of methods and forms best suited to the business which leave little discretion to the agents, while the diligence and industry required to collect the small weekly premiums on hundreds of policies and to write new business to keep the debit at a proper volume compel the agent to spend so much time in his debit area and to report his activities and account for his collections at the office so frequently as to leave him little freedom of action. It follows that the judgment of the District Court should be affirmed insofar as it rejected the claim [that the agents were independent contractors]."

Typical findings about debit insurance agents, made by the Board in legal contexts addressed to other issues

than employee-independent contractor, demonstrate the close similarity between the debit agents' work, whatever the company, and the characteristics of the work of the agents involved in this case. As to the debit agents employed by The Prudential Insurance Company of America, for example, the Board found, "The employees here involved are insurance agents, not factory production workers. Their general duties are to sell and service insurance policies. No particular time or place for such employee services are required by the employer." *Insurance Agents' International Union*, 119 NLRB 768, 783 (1957), *reversed on other grounds*, 104 U.S. App. D.C. 218, 260 F. 2d 736 (1958), *affirmed*, 361 U.S. 477 (1960). In *Metropolitan Life Insurance Company*, 138 NLRB 512, 514 (1962), also, the Board found, "Most of a debit agent's time is spent away from the office." The similarities among debit insurance agents are such that the Board has fashioned general principles of appropriate bargaining unit determination applicable to such agents. *Metropolitan Life Insurance Company*, 156 NLRB 1408 (1966), *upon remand*, *Metropolitan Life Ins. Co. v. Labor Board*, 380 U.S. 438 (1965); *Quaker City Life Ins. Co.*, 134 NLRB 960 (1961), *enforced*, 319 F. 2d 690 (4 Cir. 1963).

Students of the insurance industry have pointed out that the hallmark of the debit or industrial insurance business, in contrast to the ordinary insurance business with which the Court is perhaps more familiar, is that in the debit business the regular premiums are collected at the policyholders' home by an agent. The characteristic of the debit agent's job which distinguishes it from that of other insurance agents is that his duties include regular visitation of the policy-

holders, generally at their homes, and collection by him as agent—rather than remittance directly by the policyholder to the Home Office—of the recurring premiums. This function of regular visitation and collection, involving as it does hundreds of homes each week or month, with innumerable paper transactions to account for the monies collected and the other phases of the work, is invariably, out of practical necessity, carried out on a territorial basis, centered geographically on the group of policyholders the Company finds it economical to service through one field office.

“Combination companies [those which sell industrial or debit insurance as well as others] organize their sales force on the branch office or district office system rather than the general agency system. Since managers * * * assistant managers and agents as well as clerical personnel are appointed by the company, the branch office system will enable the home office to achieve a higher degree of uniformity in sales operations and service to policyowners.” R. W. Lederer, *Home Office and Field Agency Organization—Life* 235 (Life Office Management Association; Rev. ed. 1966). A field force organization based on the district office is invariable in the industrial or debit insurance business, M. E. Davis, an active insurance executive, pointed out in his article, “Modern Industrial Life Insurance,” in David McCahan, *Life Insurance Trends in Mid-Century* 115, 122 (1950), because “This permits a more direct contact between the management at the home office and the individual agent, and a direct control of the many detailed field services that are required in connection with this branch of the business.”

“A strict system of supervision is necessary in the industrial insurance field in order to make sure that

each agent is performing his task properly." Maurice Taylor, *The Social Cost of Industrial Insurance*. 114 (1933). It remains true, as written by insurance company executive F. L. Hoffman, "Industrial Life Insurance," in H. P. Dunham, *The Business of Insurance*, vol. 1, 468 (1912), that:

"It has been properly said that success in industrial insurance is largely a question of effective supervision and painstaking attention to matters of detail. Accordingly the field organization has been developed with a due regard to almost perfect oversight and office control over the activity and business results of individual agents and the supervising field officials * * *. The fact that premiums are required to be collected weekly in the most systematic manner from the houses of the insured involves the necessity of employing agents * * * and their effective supervision throughout practically every working hour of the week."

d. *Skill Required*. The level of skill required in this particular work is shown by the facts that no particular education or experience is required to be employed as an agent and the Company provides all the training required (pp. 22-24, *supra*).

e. *Instrumentalities, Tools And Place Of Work*. The Company alone provides whatever instrumentalities and tools are required in the agents' work: the accumulated policyholders; the insurance policies; the sales promotion literature; the forms; the Rate Book. The Company likewise alone provides the place of work, whether that be considered the district office of the Company or the debit area which the Company gives and assigns to the agent. The place of the agent's employment covers "the entire territory in which he solicited insurance, as well as the company's

office." *Richards v. Metropolitan Life Ins. Co., supra*, 19 Cal.2d at 242, 120 P.2d at 654.

f. *Length Of Time.* This is a long run, or permanent, and not an *ad hoc*, relationship (p. 11, *supra*).

g. *Method Of Payment.* The method of payment is dictated unilaterally by the Company (pp. 25-29, *supra*). The Company has provided that the basic compensation is by commission related to money collected and new policies sold. This may not be considered payment "by the job" in the truly independent contractor sense. "Of course, in a sense, each policy of insurance sold or each thousand feet of lumber hauled is a complete project, but this is not the essential character of the service when it is understood that the work is to be continuous for an indefinite period." *Larson, op. cit. supra*, at 648.

h. *Regular Business Of The Employer.* The work performed by these agents is patently a part of the regular business of the employer. These agents are an integral and inseparable part of the Company's organization and operations (pp. 10-11, *supra*).

i. *Belief Of Parties.* The record shows that the parties are divided as to whether they believe they are working in an employee or independent contractor situation, whereas the Company states it believes the relationship is one of independent contractors. Certainly the legal characterization put forward unilaterally by the employer does not aid in resolving the issue. "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

j. *Principal In Business.* There can be no question that the Company is in the insurance business as a principal.

In the light of these factors set out in the *Restatement*, these agents must be held to be employees.

4. Decisions of This Court.

It is true in this case, as it was in *Goldberg v. Whitaker House Coop., supra*, that the workers whose status is in issue are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, the Company, selling what the Company desires to market and receiving what the Company dictates. The Company management fixes the commission rates at which they work; it can compel their resignation for substandard work or for failure to obey the Company rules and policies. The Company, in other words, can hire or fire these agents.

Unlike the driver-owners who were held to be independent contractors in *United States v. Silk, supra*, these agents are not small businessmen. They do not own any of the instrumentalities or property utilized in the business; they have made none of the required investment. They do not hire any employees. They do not undertake any economic risk other than losing their jobs. They are subject to Company control. And they have no opportunity for "profit". Like those held to be employees in the *Silk* case, these agents provide only themselves. They have no opportunity to gain or lose except from the work which they do on their debits and from utilizing the Company resources and investment. These agents work regularly in the course of the employer's trade or business.

The factual touchstones upon which this Court has relied in its decisions militates for the judgment of "employee" in this case.

II. THE COURT BELOW MISCONCEIVED THE APPLICABLE LEGAL STANDARDS.

A. The Court Below Misconceived the Scope of Review Open to It Under the Act.

The Court below manifestly believed that it was in a position to re-evaluate the relative weight of the facts as found by the Board and thus to determine the issue as though the Board had rendered no decision that these agents were employees. The Court evidently assumed the issue to be one purely of law. It clearly disregarded the principle applicable to cases involving employment status that "it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation." *Restatement* 486-487.

Similarly, the Court below overlooked the well-established and reiterated principle that a Court of Appeals "may not 'displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*.' [*Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951)] at 488. * * * But the Examiner * * * sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records." *Labor Board v. Walton Mfg. Co.*, 369 U.S. 404, 405, 408 (1962).

The Court below assumed that the nature of the issue afforded it some wider than normal scope for promulgating its own view of how the Act should be interpreted rather than the Board's. It failed to recog-

nize that in the application and interpretation of the provisions of the Act, expressly including the definition of "employee" in Section 2(3), it was bound to observe "the usual deference to Board expertise in applying statutory terms to particular facts." *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 190 (1965).⁷

In truth, the Court, while adopting the rubric of the "substantial evidence" test—whether there is substantial evidence to *support* the Board's findings—made clear that its review was directed instead to finding factors "consistent with an independent contractor status" (371 F.2d at 322, A. 1239)—to searching for some plausible grounds for overturning the Board's findings. This is at the polar extreme from

⁷ So far was the Court below from according any requisite deference to the Board that it declared that the Trial Examiner's incidental dictum about off-stand demeanor, which he had expressly stated he was not relying on, for he relied on "the other and *themselves sufficient* bases for my findings," 154 NLRB at 48, A. 1151 (emphasis added), and which the Board had expressly disavowed, *id.* at 38, n. 2, 1200, n. 2, revealed the record "undisignedly" to be "tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order." 371 F.2d at 324, A. 1243. This refusal to permit the Board to specify the record it was relying on, in limitation of the facts relied upon by the Examiner, is opposed to sound administrative practice and to the law. *Cf. N.L.R.B. v. American Federation of Television and Radio Artists*, 285 F.2d 902, 903 (6 Cir. 1961). Inasmuch as the Board certainly has the power to overturn a finding of the Examiner, where the evidence which the Board relies on is sufficient to support its decision, e.g., *N.L.R.B. v. Johnson*, 310 F.2d 550 (6 Cir. 1962); *N.L.R.B. v. Jackson Maintenance Corp.*, 283 F.2d 569 (2 Cir. 1960), *a fortiori* the Board may uphold an Examiner's finding upon exclusion of a miniscule portion of arguably admissible evidence which the Examiner considered, all of the evidence of record remaining and amply supporting the Board decision.

that limited scope of judicial review of essentially factual findings of the Board demanded by the plain terms of the Act and the many decisions of this Court.

B. The Court Below Misconceived the "Right of Control Test".

While purporting to apply the "right to control" test, the Court patently misapplied it by derogating many of the evidences of the exercise and reservation of the right of control, with the assertion that the controls upon which the Board relied were inherent in the nature of the business. For example, the Court swept to one side all the evidences of control which were admittedly supported by substantial evidence with the following observation:

"They are not indicative of an existence or exercise of control directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors." 371 F.2d at 322, A. 1239.

Likewise, the Court disregarded the evidence that Company control was required for transfer on the ground that "Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such transfers and its need for knowledge of the same is readily apparent." *Id.* at 323, A. 1240. Identically, the Court denied probative force to the evidence that

the assistant managers accompany the agents and service the agents' debits when their agents are absent, upon its statement that:

"The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case." *Id.* at 323, A. 1240-1241.

To give one more illustration of the Court's view of the right of control test, the requirement that these agents report weekly to the office and attend sales meetings was thus asserted to be neutralized in legal effect:

"The continuity of the relationship involved and the mutual interest of the parties in the result to be obtained make it imperative that the agents be kept informed with respect to changes in the insurance contracts the Company offers and desirable that they be made aware of incentive programs sponsored by the Company to stimulate sales efforts." *Id.* at 323, A. 1241.

The vice in the Court's view is that all the facts are manifest evidences of the right of control and thus must be taken into account in any proper application of the right of control test. They may not be disregarded for any reason. The law is concerned with whether these evidences of the right to control do or do not exist in fact; and not with the reason for their existence. If the right of control exists in fact, it is dispositive in law. That the right to control *must* exist in some industry or occupation cannot be rendered

neutral in law; it is the dispositive proof that the employment relationship exists in accordance with the right of control test.

If "the whole project involved many interdependent details, the control of any one of which could not be surrendered without disorganization of the whole", this is a decisive circumstance militating for the conclusion of "employee". *Pennsylvania R. Co. v. Bar-lion*, 172 F.2d 710, 712 (6 Cir. 1949); *Pennsylvania R. Co. v. Roth*, 163 F.2d 161 (6 Cir. 1947). What is decisive is "the question whether the work is part of the employer's regular business or operation. When loading, trucking, and the like have to be keyed in with the integral production pattern, the modern tendency is to infer that the employer must necessarily have reserved the right to control as many details as are necessary to keep all the gears in his production machine smoothly meshed together." *Larson, op cit. supra*, at 642. In this case, the whole project of accomplishing the debit agents' work for the Company may well inevitably require close controls (see pp. 61-62, *supra*). In this case, the collections, sales conduct of the business in compliance with the state insurance laws and with the rules and the supervision of the Company, and like factors have to be keyed together; and the Company must necessarily have reserved the right to control all the details necessary to keep its debit operations smoothly producing and meshed together. For precisely these reasons these agents are employees.

CONCLUSION

For the reasons stated herein, the judgment of the Court below should be reversed and the Order of the Board should be enforced.

Respectfully submitted,

ISAAC N. GRONER

Cole and Groner

1730 K Street, N.W.

Washington, D. C. 20006

Attorney for Insurance

Workers International

Union, AFL-CIO

Of Counsel:

COLE AND GRONER

1730 K Street, N.W.

Washington, D. C. 20006

APPENDIX

Statutory Provisions Involved

National Labor Relations Act, as amended, 29 U.S.C. §§ 141 et seq.:

Section 2.(3), 29 U.S.C. § 152(3)

Sec. 2. When used in this Act— . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7, 29 U.S.C. § 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8.(a)(1)(5), 29 U.S.C. §158(a)(1)(5)

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
 . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 10.(e) and (f), 29 U.S.C. § 160(e) and (f)

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the

Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in

the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Nos. 178 & 179

Office-Supreme Court,
FILED

NOV 29 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

**INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ERWIN N. GRISWOLD,
Solicitor General,

PHILIP A. LACOVARA,
*Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

FRANK H. ITKIN,
Attorney,

*National Labor Relations Board,
Washington, D.C. 20570.*

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	2
Statement	3
A. The Board's Findings of Fact	3
1. Hiring and job assignment	4
2. Compensation and expenses	6
3. Supervision and termination	9
B. The Decisions of the Board and Court of Appeals	14
Summary of argument	15
Argument	16
The Board Properly Determined that the Company's Debit Agents are Employees Within the Meaning of the Act	16
A. The Board was reasonable in concluding that, on the record as a whole, the debit agents are employees of the company, rather than independent contractors	16
B. The court below applied an erroneous stand- ard in reviewing the Board's conclusion	25
Conclusion	30
Appendix	31

CITATIONS

Cases:

<i>Aisenberg v. Adams Co.</i> , 95 Conn. 419, 111 Atl. 591	25
<i>Atlantic Coast Life Insurance Co. v. United States</i> , 76 Supp. 627	24, 28
<i>Atlantic Refining Co. v. Federal Trade Commission</i> , 381 U.S. 357	20
<i>Bartels v. Birmingham</i> , 332 U.S. 126	18
<i>Capital Life and Health Insurance Co. v. Bowers</i> , 186 F. 2d 943	24
<i>Carter's Dependents v. Palmetto State Life Insurance Co.</i> , 209 S.C. 67, 38 S.E. 2d 905	24

Cases—Continued

<i>Communist Party v. Subversive Activities Control Board</i> , 367 U.S. 1.....	Page 20
<i>Consolo v. Federal Maritime Commission</i> , 383 U.S. 607.....	26
<i>Continental Bus System, Inc. v. National Labor Relations Board</i> , 325 F. 2d, 267.....	18
<i>Deaton Truck Line, Inc. v. National Labor Relations Board</i> , 337 F. 2d 697, certiorari denied <i>sub nom.</i> <i>Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 612 v. National Labor Relations Board</i> , 381 U.S. 903.....	18, 27
<i>Frito-Lay, Inc. v. National Labor Relations Board</i> , 66 LRRM 2542 (C.A. 7), decided November 7, 1967.....	28
<i>Gillespie v. Ford</i> , 225 S.C. 104, 81 S.E. 2d 44.....	24
<i>Gray v. Powell</i> , 314 U.S. 402.....	28
<i>Gulf Life Insurance Co. v. McDaniel</i> , 75 Ga. App. 549, 43 S.E. 2d 784, certiorari dismissed, 203 Ga. 95, 45 S.E. 2d 64.....	24
<i>Hanna Mining Co. v. Marine Engineers</i> , 382 U.S. 181.....	20
<i>International Union of United Brewery etc. v. National Labor Relations Board</i> , 298 F. 2d 297, certiorari denied, <i>sub nom.</i> <i>Gulf Bottlers, Inc. v. National Labor Relations Board</i> , 369 U.S. 843.....	27
<i>Journeyman Plasterers Protective and Benevolent Society of Chicago v. National Labor Relations Board</i> , 341 F. 2d 539.....	19, 28
<i>Life & Casualty Insurance Co. v. Unemployment Compensation Commission</i> , 178 Va. 46, 16 S.E. 2d 357.....	24, 25
<i>Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko</i> , 373 U.S. 701.....	19
<i>Minnesota Milk Company v. National Labor Relations Board</i> , 314 F. 2d 761.....	26
<i>National Labor Relations Board v. American Oil Co.</i> , 66 LRRM 2539 (C.A. 7), decided November 8, 1967.....	28
<i>National Labor Relations Board v. Coca-Cola Bottling Co.</i> , 350 U.S. 264.....	20
<i>National Labor Relations Board v. E. C. Atkins & Co.</i> , 331 U.S. 398.....	29

Cases—Continued

<i>National Labor Relations Board v. Elliott-Williams Co.</i> , 345 F. 2d 460.....	Page 28
<i>National Labor Relations Board v. Hearst Publications, Inc.</i> , 322 U.S. 111.....	17, 20, 29
<i>National Labor Relations Board v. Insurance Agents</i> , 361 U.S. 477.....	23
<i>National Labor Relations Board v. Keystone Floors, Inc.</i> 306 F. 2d 560.....	26
<i>National Labor Relations Board v. Lindsay Newspapers, Inc.</i> , 315 F. 2d 709.....	26
<i>National Labor Relations Board v. Metropolitan Insur- ance Co.</i> , 380 U.S. 438, on remand, 156 NLRB 1408..	23
<i>National Labor Relations Board v. Nu-Car Carriers, Inc.</i> , 189 F. 2d 756, certiorari denied, 342 U.S. 919..	18, 27
<i>National Labor Relations Board v. Phoenix Mutual Life Insurance Co.</i> , 167 F. 2d 983, certiorari denied, 335 U.S. 845.....	23, 28
<i>National Labor Relations Board v. Swift and Company</i> , 292 F. 2d 561.....	19
<i>National Van Lines, Inc. v. National Labor Relations Board</i> , 273 F. 2d 402.....	28
<i>Radio Officers Union v. National Labor Relations Board</i> , 347 U.S. 17.....	20
<i>Review Board v. Mammoth Life & Accident Insurance Co.</i> , 111 Ind. App. 660, 42 N.E. 2d 379.....	24
<i>Rutherford Food Corp. v. McComb</i> , 331 U.S. 722.....	18
<i>Singer Manufacturing Co. v. Rahn</i> , 132 U.S. 518.....	20
<i>Superior Life, Health & Accident Insurance Co. v. Board of Review</i> , 127 N.J.L. 537, 23 A. 2d 806.....	24
<i>Superior Life, Health & Accident Insurance Co. v. Unem- ployment Compensation Board of Review</i> , 148 Pa. Super. 307, 25 A. 2d 806.....	24
<i>Unemployment Compensation Commission v. National Life Insurance Co.</i> , 219 N.C. 576, 14 S.E. 2d 689....	25
<i>United Insurance Co. v. National Labor Relations Board</i> , 304 F. 2d 86.....	25, 28
<i>United States v. Silk</i> , 331 U.S. 704.....	18
<i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U.S. 474.....	20, 26

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, <i>et seq.</i>)	Page
Section 2(3)-----	2, 16, 31
Section 2(11)-----	19
Section 7-----	31
Section 8(a) (5) and (1)-----	14, 32

Miscellaneous:

Annot., 36 A.L.R. 2d 261 (1954)-----	17
Asia, <i>Employment Relation: Common-Law Concept and Legislative Definition</i> , 55 Yale L.J. 76 (1954)-----	17
93 Cong. Rec. 6441-6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1537-----	17
H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-33, 1 Leg. Hist., 1947, pp. 536-537-----	17
H. Rep. No. 245, 80th Cong., 1st Sess. 18, 1 Leg. Hist. 1947, p. 309-----	17
Restatement of the Law, Agency 2d, Sec. 220-----	18

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 178

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

No. 179

**INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 1231-1243) is reported at 371 F. 2d 316. The Board's decision and order (R. 1199-1200, 1122-1183) are reported at 154 NLRB 38.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1966 (R. 1244). On March 16 and 21, 1967, Mr. Justice Clark extended the time for filing petitions for writs of certiorari to and including May 20, 1967. On May 19, 1967, the Board (No. 178) and the Union (No. 179) filed petitions, and, on October 9, 1967, both petitions were granted (R. 1245, 1246). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 31-32.

QUESTION PRESENTED

The protective provisions of the National Labor Relations Act extend only to employees—a category which excludes “any individual having the status of an independent contractor” (Section 2(3)). In this case, the National Labor Relations Board found that “debit agents” of an insurance company were employees within the meaning of the Act. The question presented is whether the Board properly construed and applied the standards for distinguishing employees from independent contractors, so that the court of appeals overstepped its reviewing function in setting aside the Board’s order.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

United Insurance Company of America ("United") is engaged in the sale of insurance¹ through its home office in Chicago, Illinois, and its district offices located in most states. Every district office has a manager and several assistant managers. Each assistant manager is in charge of a staff of four or five individuals called "debit agents." United has 3300 such agents. (R. 1126, 1165; 40-42, 396-397, 421, 458-459, 469, 1045, 1046.)²

On June 4, 1964, the Insurance Workers International Union filed a petition with the Board seeking certification as the collective bargaining representative of United's debit agents in Baltimore City and Anne Arundel County, Maryland. United, however, asserted that the debit agents were "independent contractors" and not "employees" within the meaning of the Act. The parties agreed to a consent election, with United reserving its right to contest the issue of coverage after the representation proceeding. The Union won the election,³ was certified by the Board on August

¹ United writes and sells industrial and ordinary life insurance, and industrial and commercial health, accident, and hospitalization insurance (R. 95, 396-398). It also handles fire insurance written by United Fire Insurance Company (R. 25, 46, 63-67, 424-425, 1062-1063).

² Page references before the semicolon are to the administrative findings, those after to the evidence.

³ Some debit agents, who were included in the agreed-upon unit and who voted in the Board-conducted election, had been employed by Quaker City Life Insurance Company prior to that company's merger with United shortly before (R. 1133-

14, 1964, and requested recognition from United on August 20. On September 1, United refused to recognize the Union, solely on the ground that its debit agents were independent contractors rather than employees. (R. 1122-1123, 1132-1133; 8-9, 1045-1050.) This unfair labor practice proceeding ensued.⁴

The Board made the following findings with respect to the status of the debit agents:⁵

1. HIRING AND JOB ASSIGNMENT

United obtains debit agents through newspaper advertisements, referrals, and from other companies. A prospective agent must fill out an application provided

1134; 177-178, 183-185, 334-339, 349-352, 384-387, 404, 1117-1118). As the court of appeals noted (R. 1235), "Quaker had chosen to maintain an employer-employee relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County were represented by the Union."

⁴ The Union was the charging party before the Board, and intervened in the proceeding by the Company in the court below (in which the Board cross-petitioned for enforcement) to review the Board's order. The Union also filed a separate petition for review seeking additional relief that the Board had not awarded. In light of its determination to set aside the Board's order, the court below found it unnecessary to consider the Union's petition. Both the Board (No. 178) and the Union (No. 179) filed petitions for certiorari; because the Board was a respondent in the Union's proceeding below, it is a respondent in No. 179. The Union, however, is not pressing in this Court its prayer for further relief from the Board, and thus both the Board and the Union are urging the same positions before this Court.

⁵ The Board adopted (R. 1199-1200) the findings, conclusions, and recommendations of the trial examiner (R. 1122-1183), although it expressly disavowed his observation that the demeanor of the debit agents to their supervisors during the hearing further suggested the employer-employee relationship.

by the Company and be interviewed by a district manager. No prior experience in insurance work is required. (R. 1139; 199-200, 403-404, 725-727, 768, 831).

When United hires an applicant, it assigns him to a particular district office, under the supervision of a particular assistant district manager (R. 1165; 40, 42, 147, 854).^{*} A State license, costing from \$2.50 to \$10.00, specifically permits the agent to sell insurance only for the Company. Although some agents may pay the initial fee for the license, the Company always pays the cost of renewing it. (R. 1138-1139; 24-26, 456, 694, 728, 755, 811.) The Company then issues him a "debit book." This book—which is Company property and must be returned to the Company upon termination of the agent's service (R. 1155; 148-149, 473, 490)—contains the names and addresses of the Company's existing policyholders in a relatively concentrated geographic area. The debit agent's job is to collect premiums from the policyholders listed in this book, to prevent the lapsing of policies, and to sell such new insurance as time allows. Since he works mainly with industrial insurance, however, which unlike ordinary or commercial insurance involves smaller coverage or benefits and provides for the payment of premiums on a weekly basis, the collection of premiums occupies the bulk of the agent's time, and there is little time left for new sales. (R. 1137-1138,

^{*}The Company may thereafter transfer him to a different location or supervisor (R. 1157; 292-294, 480-481). The agent's business card contains the phone number and address only of the district office to which he is assigned (R. 757-758).

1150, 1169; 23-24, 40-44, 95, 186-187, 216-217, 357, 397-398, 417-418, 694-695, 700-702, 727, 740-741, 756, 815-817, 854, 860-863). An agent is expected to secure Company approval for the transfer of the administration of a policy to another agent (R. 1160-1163; 74-75, 138-140, 148-149, 243-245, 248-251, 340-342, 359-362, 376-377, 841, 1065).

2. COMPENSATION AND EXPENSES

United directly compensates the debit agents pursuant to the "Agent's Commission Plan." The plan, which is unilaterally promulgated by the Company, is uniform as to all agents, and must be signed by each agent when he is hired (R. 1175; 27, 183, 185, 491-494, 1051-1059). The Company may unilaterally amend the plan at any time and existing agents may then choose to work under the plan they originally signed or under the new arrangement. New agents, however, must accept the most recent plan. (R. 1175; 491-494, 706, 893).⁷

The plan basically provides that a debit agent may retain 20 percent of his weekly premium collections

⁷ By executing the "Agent's Commission Plan," an agent agrees that "he will promptly deposit with the Company all moneys collected * * * and due the Company," and that "the Company reserves the right to conform commission payments to the agent in accordance with the true condition of his account and records" (R. 1058). As shown *infra*, pp. 11-12, United exercises this right by means of a weekly review of the agent's deposits and accounts (R. 1143; 41, 55, 1060-1064).

on industrial insurance (R. 1143, 1175, 1178; 1051).⁸ In addition, the agent receives 10 percent of the premiums collected from holders of ordinary insurance, and 50 percent of the first year's premiums on new ordinary insurance sold by him (R. 1056-1057). Unlike the industrial insurance premiums, the agent remits the entire ordinary premium to the Company and the Company then pays him the percentage owed (R. 812-815). The Company also provides a "service award bonus," essentially a vacation-with-pay plan under which an agent may take one or two weeks off

⁸ The "Agent's Commission Plan" also provides for weekly bonuses, ranging from 2 to 4 percent of weekly collections, to agents whose collections average 95 percent or more of the premiums due and who have increases in collections averaging 50 cents per week (R. 1051-1052). The agent is also credited with a reserve account, essentially composed of premiums on new policies sold by him minus premiums on lapsed policies; and the Company adds to this reserve a quarterly bonus if the agent has a 92 percent or better collection average and a 50-cent weekly increase. From this reserve an agent with a 90 percent or better collection average may draw \$1.00 to \$3.50 weekly, depending on his collection average and the size of the reserve. He may "sell" his reserve to the Company every six months if he has a 95 percent collection average and has serviced the debit for more than a year, "but in no case will the Company purchase" reserves "exceeding \$500.00 for any six month period" (R. 1178; 1052-1057, 198, 730-739). Thus, the plan limits an agent's earnings by limiting the amount of new business commissions that he may draw per week, and the amount that can be drawn from the reserve for any six-month period (R. 1178; 198, 730-739, 1052-1053, 1056-1057).

depending on his length of service with the Company and be paid a percentage of the average of his earnings for the preceding four weeks. The choice of vacation periods turns on seniority with the Company, after the assistant manager has selected his vacation. While the agent is on vacation, the assistant manager collects premiums and sells new policies for him, for which the agent receives the usual commissions and credits.⁹ (R. 1153, 1154, 1156-1157, 1164-1165; 146-148, 474-476, 646-647, 752). The debit agents participate in the group insurance plan and profit-sharing pension fund maintained by the Company, which is expressly for the benefit of "eligible employees,"¹⁰ and the amounts contributed by them are supplemented by the Company (R. 1176-1177; 71-73, 890, 891, 904, 1098-1104). The Company pays employer social security taxes for the agents and may also withhold income taxes for them (R. 1177-1178; 704, 884-889, 923-925).

In addition to the debit books, United supplies the agents, at its own expense, with rate and premium receipt books; application, transfer, lapse, and reporting forms; and various sales aids and brochures (R. 1144, 1166; 44-45, 92, 113-117, 747-748, 1060-1096).¹¹ At the district offices, the Company also provides the

⁹ Assistant managers similarly substitute for agents who are ill (R. 1164; 428, 566-567, 646-647).

¹⁰ The Rules of the fund define "employee" as including "for the purposes of this plan only, any industrial agent" (R. 1099).

¹¹ Like the debit books (*supra*, p. 5), the rate and premium receipt books also remain the property of the Company and must be returned upon termination of service (R. 1155; 1068, 148-149, 473, 490). The sales materials distributed bear only United's name; the name of the agent does not appear (R. 113-120).

agents with work tables, chairs, office equipment such as adding machines, telephone service, clerical help, and the postage used in sending receipts to policyholders who have remitted their premiums by mail, all without cost to the agent (R. 1179; 61-62, 97-98, 121-124, 298-302, 339-340, 446, 458, 725, 1097). The agents do not have regular offices for which they pay rent, although some set aside a work space in their homes and deduct the maintenance involved for tax purposes (R. 1179; 125, 230-231, 725, 761, 788, 821-822, 866-867). They have no employees or regular assistants and, indeed, are forbidden to hire unlicensed persons to do their collecting; do no advertising; and are not required to provide a bond (R. 1140-1141; 71, 117-118, 148, 723, 788, 818). The Company for all practical purposes assumes the losses resulting from theft of collection moneys from agents (R. 1170-1173; 149-157, 211-212, 312, 513-516, 573-587, 1115-1116). When an agent's debit covers a wide area or is a considerable distance from the district office, the Company pays him an additional one percent of collection for travel expenses (R. 1155, 1176; 357-358, 375, 409-410, 447-448, 519-520, 617).¹²

3. SUPERVISION AND TERMINATION

On the important issue of the Company's right and exercise of control, the Board found that the high ratio of district managers and assistant managers (*supra*,

¹² Except as noted above, agents pay their own telephone, postage, and transportation expenses (R. 408-409, 540-541, 818). Those who use business cards and distribute small gifts to their policyholders bear the expenses involved (R. 1140; 408-409, 507-508, 617-618, 707-708, 757-759, 835, 851-852, 1114).

p. 3) assures the Company of close supervision of its debit agents throughout their service (R. 1156, 1165; 42, 317, 355-357, 471). At the outset, the assistant manager accompanies a new agent on his rounds to acquaint him with his customers and show him the approved collection and selling techniques (R. 459, 727). The agent is also supplied with a Company "Rate Book" containing detailed instructions on how to perform many of these duties; the Company requires the agent to follow these rules (R. 92, 483-484, 1068-1069).¹³ Whenever the Company deems it necessary, an assistant manager or other Company official accompanies an agent on his rounds (R. 1164, 1166; 131-137, 517, 594, 722, 743-744). The manager or assistant manager may also call on a policyholder with the agent if a premium has not been collected by the twentieth of the month, and the Company requires that a "supervisor" call on policyholders whose policies have lapsed (R. 1153; 1108, 1112). An assistant manager periodically accompanies each agent on a "field inspection" of the policyholders' premium receipt books (R. 568-569). As previously mentioned, when assistant managers service agents' accounts during illness or vacation, their efforts are credited to the

¹³ For example, the rate book describes the specific manner in which an application for insurance should be filled out, including the way an agent and applicant should sign (R. 1089-1090, 1095-1096). Managers must approve all applications for ordinary insurance obtained by agents in their first year of service, and, thereafter, must review every such application when the applicant has not had a medical examination (R. 1138, n. 20; 1088, 1111).

agents involved (see note 9, *supra*, p. 8, and accompanying text).

When a policyholder has not paid his premium for several weeks, the agent is required to file a report, signed by a manager, on a lapse form provided by United (R. 81-84, 1066-1067, 1091-1092). The sanction imposed by the Company for failure to make such a report before the fourth week of nonpayment is that the agent himself becomes liable for premiums due thereafter (R. 620-623, 896-897). If a collection is made before the expiration of four weeks, the agent must call the office to have the listed policy removed from the lapse form (R. 82). The Company requires the agent to carry lapsed policies on his debit book for 13 weeks (R. 362, 377-378, 896-897, 913).

Furthermore, once each week, on a day designated by United, the agent is required to report to the district office in order to turn over the premiums collected, file weekly reports, and attend staff meetings (R. 1144-1149, 1166; 41, 54-55, 126-127, 419, 450, 504-506).¹⁴ The reports must be submitted on forms supplied by the Company (R. 1148-1149; 54-59, 64-68, 420-421, 606, 1060-1064), and the agent "warrants the accuracy of his accounts and records" (R. 1058). The "Agent's Weekly Account" form shows the collections

¹⁴"All agents in the district attend unless they are excused" (R. 1146; 41). In special circumstances, a change in the schedule is permitted, or an assistant manager may direct an agent to meet him in order to turn in new business early (R. 1145-1147; 41, 332-334, 363-364, 379-380, 506, 720, 779).

for the week, the agent's collection percentage, the increase or decrease in business for the week and since the beginning of the year, the amount of reserve the agent has accumulated, and the balance due the Company (R. 1062-1063). The "Abstract of Agent's Weekly Report" indicates the amount the agent must remit to the Company; it also contains spaces for amounts to be paid to the Company for social security tax, withholding tax, pension fund, and group insurance (R. 67-70, 884-885, 1064). The assistant manager reviews these reports, requires the agent to make the necessary changes, and approves them when correct. He then returns the reports to the agent, who deposits the reports and funds due the Company with the Company cashier. (R. 1148, 1164; 55, 482-483, 1060-1064.)¹⁵ At the staff meetings, the managers discuss the latest bulletins and directives from the home office, familiarize the agents with policies on which production is low, ask for pledges of new business, demonstrate sales techniques, and explain new policies (R. 1145; 128-132, 529-531, 533, 796-800, 806-808).

United also requires that each of the agents submit quarterly a complete audit of his debit book, on a form provided by the Company, reflecting the actual paid-up status of each of his policyholders; he must then make a true cash accounting (R. 55-58, 1060-

¹⁵ Agents may not settle their accounts by personal check without special permission (R. 1148; 68, 450).

1061). In addition, the manager may order an audit of an agent's debit at any time (R. 613, 615).¹⁵

Complaints against an agent are investigated by the manager or assistant manager, and, if well founded, the manager talks with the agent to "set him straight" (R. 421, 451-452). Agents who have poor production records, or who fail to maintain their account properly or to follow Company rules, are "cautioned" (R. 721). While United does not require agents to make collections or sell during any specific hours, it expects them to obtain a high percentage of collections, to avoid policy lapses, and to bring in new business (R. 1141-1143; 131, 238-239, 343, 440, 491, 519, 770-771, 822-825). The district manager submits a weekly report to the home office, specifying, *inter alia*, the agents whose records are below average; the amounts of their debits; their collection percentages, arrears, and production; and what action the district manager has taken to remedy the production "let down" (R. 344-347, G.C. Exh. 40 A-H). If improvement does not follow, the Company asks such agents to "resign," or exercises its right under the "Agents

¹⁵ A few debit agents infrequently handle claims for United, after first obtaining special permission from it. The Company turns over the claim to the agent, who verifies it and then returns it for further processing and payment. An assistant manager may either accompany the agent when the agent is verifying the claim or may verify the claim independently. (R. 1167; 521-522, 98-99, 273-277, 474, 783-787, 846-850.)

Commission Plan" to fire them "at any time" (R. 1142-1143; 1058, 1120, 442-443, 466-467, 568, 569, 591-600, 609-610, 615-616, 721-722.) As the Chairman of the Board of United explained in a letter which he had read to the debit agents around the time this unfair labor practice proceeding arose (R. 1149; 690-692, 1120):

* * * if any agent believes he has the power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to make the agents final.

* * * [W]e will not allow anyone to interfere with us and our successful plan.

B. THE DECISIONS OF THE BOARD AND COURT OF APPEALS

On the basis of the facts summarized above, and in light of the record as a whole, the Board determined that the debit agents were "employees" within the meaning of the Act, and not "independent contractors." The Board therefore concluded that United had violated Section 8(a)(5) and (1) of the Act by admittedly refusing to bargain with the Union after it won the representation election and had been certified as the representative of the agents in an appropriate unit. (R. 1199-1200, 1180-1183.) The Board's order, traditional in such cases, required United to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices (R. 1181-1183).

On the Company's petition to review and the Board's cross-petition to enforce, however, the court of appeals found that the debit agents were independent contractors, and declined to enforce the Board's order (R. 1231-1243). The court viewed the evidence as "consistent with an independent contractor status" (R. 1239). In reaching this conclusion, the court accorded no significance to the evidence showing United's "financial controls, accounting procedures, and business methods and practices," since those factors "would appear to be normal to the operation of the premium collection phase of" the Company's business whether it was operated through employees or independent contractors (R. 1239). The court further discounted evidence of Company insistence on attendance at sales meetings and conferences with assistant managers because such evidence was "equivocal" (R. 1241). The court finally concluded that there "is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions." (R. 1243.)

Both the Board (No. 178) and the Union (No. 179) now challenge this adverse ruling.

SUMMARY OF ARGUMENT

The Board properly exercised its authority in concluding that United's debit agents are employees rather than independent contractors. The Board applied the proper legal standard, *i.e.*, the governing principles of the law of agency. It also reasonably evaluated the facts in the record as indicating employee status. The Board found that United exercises

substantial direction and control over the performance by the agents of their work; that the agents have relatively permanent working relationships with United; that they make no significant capital contribution, assume no risk of loss or possibility of profit in excess of their limited commissions; that their work is intimately involved in the Company's routine business and is not merely the ad hoc rendition of services; and that their work requires no prior experience or special training. These and other facts fully support the Board's conclusion.

In reversing the Board's determination, the court below improperly substituted its own assessment of the significance of the evidence for that of the agency. The court quarreled with the Board's resolution of conflicting inferences, and preferred its own conclusions; it refused to accord sufficient weight to the Board's primary responsibility for applying the terms in the statute it administers, in variant factual situations.

ARGUMENT

THE BOARD PROPERLY DETERMINED THAT THE COMPANY'S DEBIT AGENTS ARE EMPLOYEES WITHIN THE MEANING OF THE ACT

A. THE BOARD WAS REASONABLE IN CONCLUDING THAT, ON THE RECORD AS A WHOLE, THE DEBIT AGENTS ARE EMPLOYEES OF THE COMPANY, RATHER THAN INDEPENDENT CONTRACTORS

1. The protective provisions of the National Labor Relations Act extend only to "employees"—a term which excludes "any individual having the status of an independent contractor" (Section 2(3), *infra*, p.

31). Congress has made it clear that whether an individual is an employee or an independent contractor is to be determined by application of general agency principles.¹⁷ Although the court below focused predominantly on the Company's right of control *vel non* over the manner and method by which the debit agents perform their assignments,¹⁸ under agency principles

¹⁷ In excluding "independent contractors" from the definition of "employee" in 1947, Congress indicated an intention to overrule the substantive holding in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, insofar as it rested on the premise that agency principles were not dispositive in determining whether an individual was an employee for purposes of the Act. (In *Hearst*, this Court had sustained the Board's finding that certain newsboys were employees, rejecting the contention that the common law standards for distinguishing between employees and independent contractors were controlling. 322 U.S. at 120-129.) But by excluding independent contractors, Congress intended "merely to make it clear" that the term "employee" is "not meant to embrace persons outside that category under the general principles of the law of agency". 93 Cong. Rec. 6441-6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1537. See also H. Rep. No. 245, 80th Cong., 1st Sess. 18, 1 Leg. Hist. 1947, p. 309; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-33, 1 Leg. Hist., 1947, pp. 536-537 (conference report).

¹⁸ The "right of control" standard for distinguishing between employees and independent contractors evolved as a method for deciding whether or not a principal should be liable for the torts committed by another in the course of work being performed by the agent for the principal. See Asia, *Employment Relation: Common-law Concept and Legislative Definition*, 55 Yale L.J. 76-82 (1945). See, generally, Annot., 36 A.L.R. 2d 261 (1954). The subsequent infusion of flexibility into the relevant standards for determining employment status is especially appropriate where the purpose of the inquiry is not to decide the applicability of *respondeat superior* liability, but to determine the coverage of the National Labor Relations Act.

all of the incidents of the relationship must be assessed and weighed, and no one factor is decisive.¹⁹

¹⁹ The *Restatement of the Law, Agency 2d*, states (Section 220, pp. 485-486):

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

* * * * *

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

* * * * *

(j) whether the principal is or is not in business."

It is well settled that, in determining employment status under the National Labor Relations Act, the Board may consider a variety of factors. See, e.g., *National Labor Relations Board v. Nu-Car Carriers, Inc.*, 189 F. 2d 756, 757 (C.A. 3), certiorari denied, 342 U.S. 919; *Deaton Truck Line, Inc. v. National Labor Relations Board*, 337 F. 2d 697, 698-699 (C.A. 5), certiorari denied *sub nom. Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 612 v. National Labor Relations Board*, 381 U.S. 903; *Continental Bus System, Inc. v. National Labor Relations Board*, 325 F. 2d 267, 271 (C.A. 10). Cf. *United States v. Silk*, 331 U.S. 704, 719: "It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management," that determines whether individuals are independent contractors. See also *Bartels v. Birmingham*, 332 U.S. 126; *Rutherford Food Corp. v. McComb*, 331 U.S. 722.

The determination whether an individual is an employee or an independent contractor thus allows considerable room for the exercise of judgment and discretion—tasks which the Board, with its wide experience in handling cases involving different hiring relationships, is specially competent to perform. As this Court explained in *Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 706, “problems of definition of status * * * are precisely ‘of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole.’” See, also, *Journeyman Plasterers’ Protective and Benevolent Society of Chicago v. National Labor Relations Board*, 341 F. 2d 539, 545 (C.A. 7). In short, as with the Board’s determination whether an individual is a “supervisor” within the meaning of Section 2(11) of the Act, the factors to be considered and the weight to be assigned them “are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine” whether an individual is an independent contractor or an employee. See *National Labor Relations Board v. Swift and Company*, 292 F. 2d 561, 563–564 (C.A. 1). Accordingly, the Board’s determination that an individual is an employee, rather than an independent contractor, is “to be accepted [by the reviewing court] if it has ‘warrant in the record’ and a

reasonable basis in law." *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 130-131.²⁰

2. We have noted that Congress intended that the determination whether a person should be classified as an employee or an independent contractor should turn on principles of agency. The Board properly applied those principles here. Even in terms of the right-of-control standard, the evidence summarized in the Statement (*supra*, pp. 5, 9-14) shows that United in fact controls and directs "not only what shall be done" by the agents "but how it shall be done." *Singer Manufacturing Co. v. Rahn*, 132 U.S. 518, 523. Thus, the Company designates the agents' place of work by assigning them to a particular district office and determining the group of policyholders which they are to serve, gives them detailed instructions on how to perform their duties, requires them to file elaborate peri-

²⁰ Although Congress, in 1947, overruled the substantive holding in *Hearst* (see n. 17, *supra*), it did not alter the part of *Hearst* dealing with the standard to be applied in reviewing the Board's determination of the kind of broad statutory issue presented here. See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 486, n. 22; *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 49-50. Indeed, the Court has continued to apply the standard of review articulated in *Hearst* not only in Labor Board cases (see *National Labor Relations Board v. Coca-Cola Bottling Co.*, 350 U.S. 264, 269), but also in cases involving other administrative determinations (e.g., *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 41; *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367-368). See also *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 190: "the usual deference to Board expertise in applying statutory terms to particular facts assures that its decision would * * * be respected in a high percentage of instances * * *."

odic reports, and makes frequent inspections of their financial and operational performance.

Moreover, in applying principles of agency, the Board properly weighed the evidence on the other indicia of employee-versus-independent-contractor status. Thus, the Board accorded due weight to the following relevant factors, among others (see the detailed discussion in the Statement, *supra*, pp. 4-9, 13-14): the agents do not operate their own independent businesses, but perform functions that are an essential part of the Company's normal operations; they need not have any prior training or experience, but are trained by Company supervisory personnel; they do business in the Company's name, with "tools" the Company provides, and ordinarily sell only its policies²¹; the terms and conditions under which they operate are promulgated unilaterally by the Company; the Company regards the premiums the agents collect as "trust funds" (R. 1070), for which the agents are required carefully to account²² and for which the Company assumes the risk of loss through robbery of the agents; the agents receive the benefits of the Company's vacation plan and group insurance and pension

²¹ Although some agents have sold policies of other companies, such activity is necessarily of a minimal nature in view of the time required to service the Company's customers (R. 1138, 1174-1175; 173-174, 291-292, 701-702, 770-771, 836, 841-842, 862-864). Moreover, United does "not look with favor" upon agents who sell "competing policies" for other companies (R. 410-411).

²² The failure of some agents to remit their collections at the very time of day specified by the Company has even led to threats of embezzlement prosecutions (R. 1143-1144; 214-215).

fund; and the agents have a permanent working arrangement with the Company under which they may continue as long as their performance is satisfactory. In the light of these and the other facts in the record, the Board's conclusion that the relationship between United and its debit agents is that of employer and employees is eminently sound.

The court below refused to accept the Board's conclusion because of factors common to many sales and service occupations which the court viewed as establishing that the agents were "on their own" (R. 1235-1236). Although the agents are "on their own" in that they perform their work primarily away from the Company's offices and may fix their own hours of work and work days, their relationship to the Company clearly exhibits a large proportion of the elements which are indicative of employee status. There are, of course, elements of the relationship between United and its debit agents which, viewed separately, may seem more consistent with independent contractor status. Debit agents are not as obviously "employees" as are production workers in a factory. But neither are they as clearly "independent contractors" as is a builder retained to construct a house. The status of these debit agents has some elements of both relationships, and the question is on which side of the line they fall. That, we submit, is a matter that Congress committed primarily to the expert agency it created, and not to the reviewing courts.

The basic facts in this case—the functions of the agents, the limits of their own responsibilities, and the

extent to which and the manner in which the Company supervises and controls them—are largely undisputed. The dispute is over what inferences properly may be drawn from such facts and over what weight should be attributed to them—whether it was unreasonable for the Board to conclude that the totality of the relationship more persuasively suggests that the agents are "employees," upon whom Congress intended to confer the protections of the Act, rather than "independent contractors," whom Congress intended to exclude. The application of agency principles in the labor-relations context is a function that goes to the essence of expert judgment—one that requires the Board to bring to bear its accumulated wisdom and experience gained through nearly a third of a century of applying the statutory definitions to a myriad of variant factual situations. Here the Board found that a significant number of pertinent factors tipped the scale in favor of treating the debit agents as employees²³—factors that similarly have led many courts to hold that debit agents are employees for var-

²³ The Board has consistently viewed debit and similar insurance agents to be employees under the National Labor Relations Act, and the insurance industry, within recent years, seems in general to have accepted that view. See e.g., *National Labor Relations Board v. Insurance Agents*, 361 U.S. 477, 479; *National Labor Relations Board v. Metropolitan Insurance Co.*, 380 U.S. 438, 440, n. 2, on remand, 156 NLRB 1408, 1415-1417; *National Labor Relations Board v. Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983 (C.A. 7), certiorari denied, 335 U.S. 845.

ious other purposes.²⁴ The Board's conclusion was a reasonable one on this record, and the court of appeals, having due regard for the agency's expertise in this area and the limited scope of review of such determinations, should have accepted it.

²⁴ Debit agents have been held to be employees for purposes of other federal legislation. See, e.g., *Capital Life and Health Insurance Co. v. Bowers*, 186 F. 2d 943 (C.A. 4); *Atlantic Coast Life Insurance Co. v. United States*, 76 F. Supp. 627 (E.D.S.C.).

Furthermore, various state courts have held the agents to be employees of the insurance company, notwithstanding that the agents:

(1) were free to set their own hours and days of work, *Gillespie v. Ford*, 225 S.C. 104, 81 S.E. 2d 44, 48-49; *Carter's Dependents v. Palmetto State Life Insurance Co.*, 209 S.C. 67, 38 S.E. 2d 905, 906-908; *Superior Life, Health & Accident Insurance Co. v. Board of Review*, 127 N.J.L. 537, 23 A. 2d 806, 807-808;

(2) were compensated on a commission, rather than a salary basis, *Review Board v. Mammoth Life & Accident Insurance Co.*, 111 Ind. App. 660, 42 N.E. 2d 379, 381; *Gulf Life Insurance Co. v. McDaniel*, 75 Ga. App. 549, 43 S.E. 2d 784, 787, certiorari dismissed, 203 Ga. 95, 45 S.E. 2d 64; *Gillespie v. Ford*, 225 S.C. 104, 81 S.E. 2d 44, 48; *Life & Casualty Insurance Co. v. Unemployment Compensation Commission*, 178 Va. 46, 16 S.E. 2d 357, 359;

(3) paid some of their own expenses, *Gillespie v. Ford*, 225 S.C. 104, 81 S.E. 2d 44, 50; *Gulf Life Insurance Co. v. McDaniel*, 75 Ga. App. 549, 43 S.E. 2d 784, certiorari dismissed, 203 Ga. 95, 45 S.E. 2d 64;

(4) were required to procure their own licenses, *Superior Life, Health & Accident Insurance Co. v. Unemployment Compensation Board of Review*, 148 Pa. Super. 307, 25 A. 2d 88, 90; *Superior Life, Health & Accident Insurance Co. v. Board of Review*, 127 N.J.L. 537, 23 A. 2d 806, 808;

(5) were free to solicit business throughout a whole state or states, *Life & Casualty Insurance Co. v. Unemployment Com-*

B. THE COURT BELOW APPLIED AN ERRONEOUS STANDARD IN
REVIEWING THE BOARD'S CONCLUSION

Instead of respecting the Board's expertise on complex questions of degree, the court below proceeded, contrary to the consistent teaching of this Court, to evaluate the evidence *de novo*, and to disregard the Board's understanding of the import of the statutory terms.

Thus, echoing the view expressed in an earlier decision involving United,²⁵ the court concluded that the predominant factual element in determining status is that a "debit agent is 'on his own'"; he "sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments" (R. 1235-1236). Moreover, the court discounted many of the reporting, accounting, and other controls relied on by the Board on the ground that they are indicative:

Only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors (R. 1239).

Unemployment Compensation Commission, 178 Va. 46, 16 S.E. 2d 357, 359, see also *Aisenberg v. Adams Co.*, 95 Conn. 419, 111 Atl. 591, 592; and (6) were authorized to employ subagents, *Unemployment Compensation Commission v. National Life Insurance Co.*, 219 N.C. 576, 14 S.E. 2d 689, 696.

²⁵ *United Insurance Co. v. National Labor Relations Board*, 304 F. 2d 86, 90 (C.A. 7).

Similarly, the court discounted the significance of the supervision provided by the assistant manager on the ground that (R. 1240-1241):

The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case.

The Board considered that in a sense the agents are "on their own," but concluded that, on balance, this was outweighed by the other factors which were indicative of employee status.²⁶ It is not the function of a reviewing court to make a *de novo* assessment of the importance of the various elements of the hiring relationship, but only to satisfy itself that the evaluation made by the Board is a reasonable one. See note 20, *supra*; *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488. See, also, *Consolo*

²⁶ Other courts of appeals have often sustained the Board's finding of an employer-employee relationship even though the workers were "on their own". See, e.g., *National Labor Relations Board v. Lindsay Newspapers, Inc.*, 315 F. 2d 709, 713 (C.A. 5) (motor route carriers for a newspaper); *Minnesota Milk Company v. National Labor Relations Board*, 314 F. 2d 761, 764-765 (C.A. 8) (milk route driver-salesmen); *National Labor Relations Board v. Keystone Floors, Inc.*, 306 F. 2d 560, 561-563 (C.A. 3) (carpeting salesmen for a company engaged in the retail sale and installation of home carpeting); *Interna-*

v. *Federal Maritime Commission*, 383 U.S. 607, 618-621.

That the court below undertook, itself, to reweigh the different factors is shown by its own statements: "Those [findings] which are supported by substantial evidence are, *in our opinion, consistent with an independent contractor status*" (R. 1239); "In any event, *it is our opinion* that this transfer of business factor is *not of critical significance*" (R. 1240); "The testimony concerning attendance of sales meetings * * * if appraised as evidencing Company insistence upon such attendance is, *nevertheless, equivocal*" (R. 1241). The court was clearly concerning itself with the weight rather than the sufficiency of the evidence when it stated: "There is too much which *detracts from the weight of the evidence* relied upon to support the findings and conclusions" (R. 1243). [Emphasis added in all quotations.] Thus, although the court purported to apply the proper standards of judicial review (R. 1237), in fact it improperly substituted its

tional Union of United Brewery, etc. v. National Labor Relations Board, 298 F. 2d 297, 299, 304 (C.A. D.C.), certiorari denied *sub nom. Gulf Bottlers, Inc. v. National Labor Relations Board*, 369 U.S. 843 (truck driver-salesmen for a bottling company); *National Labor Relations Board v. Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), certiorari denied, 342 U.S. 919 (owner-operator trailer drivers for a company engaged in transporting motor vehicles); *Deaton Truck Line, Inc. v. National Labor Relations Board*, 337 F. 2d 697, 698-699 (C.A. 5), certiorari denied *sub nom. Teamsters Chauffeurs, Warehousemen & Helpers Local Union 612 v. National Labor Relations Board*, 381 U.S. 903 (drivers of a trucking company, including owner-drivers and multiple owner-drivers).

judgment for that of the Board on a matter that lies primarily within the latter's province.²⁷

This Court has long insisted that, when Congress has left the implementation and administration of a statute to an administrative agency, the role of the reviewing court is confined to determining whether the agency's interpretation results in the "application of the statute in a just and reasoned manner." *Gray v. Powell*, 314 U.S. 402, 411.²⁸ When Congress legisla-

²⁷ Moreover, the court below in redetermining the question of independent contractor status proceeded upon an erroneous principle of law. There is no basis for the court's assumption (R. 1239-1241) that those controls over agents which are necessary to protect United's business may not be considered and relied upon by the Board in determining the agents' status. In many instances, a company will find it impossible to carry out some of its functions without detailed controls over the persons who perform them; it is somewhat ironic to treat the fact that a high degree of supervision may be necessary as irrelevant. This factor logically and economically indicates that the nature of the business is such that it must operate with employees rather than independent contractors. See, e.g., *National Labor Relations Board v. Phoenix Mutual Life Ins. Co.*, *supra*, 167 F. 2d at 987; *Atlantic Coast Life Insurance Co. v. United States*, *supra*, 78 F. Supp. at 630.

²⁸ The court below seems to apply different standards of judicial review in "employee" status cases than in those involving alleged "supervisors." Compare *United Insurance Co. v. National Labor Relations Board*, 304 F. 2d 86 (C.A. 7); *National Van Lines, Inc. v. National Labor Relations Board*, 273 F. 2d 402 (C.A. 7); *Prito-Lay, Inc. v. National Labor Relations Board*, 68 LRRM 2342 (C.A. 7), decided November 7, 1967, with *National Labor Relations Board v. Elliott-Williams Co.*, 345 F. 2d 480, 463 (C.A. 7); *Journegmen Plasterers' Protective and Benevolent Society of Chicago v. National Labor Relations Board*, 341 F. 2d 589, 545 (C.A. 7); *National Labor Relations Board v. American Oil Co.*, 68 LRRM 2339 (C.A. 7), decided November 8, 1967.

tively clarified the meaning of the term "employee" in 1947 and excluded "independent contractors," it did not reject ²⁴*Hearst* rule that when the Board applies a broad statutory term in a particular proceeding, the function of the reviewing court is limited, and "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." 322 U.S. at 131. See, also, *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U.S. 398, 403. Certainly, the Board's determination that these debit agents are encompassed within the term "employees" cannot be said to be unsupported by the record and unreasonable in law.²⁵

²⁵ Finally, there is no merit to the suggestion of the court below (R. 1242-1243) that the Board's determination of employee status was tainted by an isolated comment by the examiner with reference to the off-stand demeanor of the parties' representatives (R. 1151-1152). (See note 5, *supra*.) First, the Board's finding rests largely upon undisputed evidence (*supra*, pp. 3-14; R. 1124). Second, a fair reading of the record shows that the examiner's comment was dictum, incidental to his summary of documentary evidence (R. 1151). Accordingly, the Board could, as it did, disavow the comment (R. 1200, n. 2) without impairing the validity of the examiner's ultimate finding.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case should be remanded to that court with directions to enforce the Board's order.)

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PHILIP A. LACOVARA,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

FRANK H. ITKIN,
Attorney,
National Labor Relations Board.

NOVEMBER 1967.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SUPREME COURT, U. S.

FILED

DEC 29 1967

Nos. 178 & 179.

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

October Term, 1967

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

**INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO,**
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

**On Writs of Certiorari to the United States Court of
Appeals for the Seventh Circuit.**

**BRIEF FOR UNITED INSURANCE COMPANY
OF AMERICA.**

**SCHNADER, HARRISON, SEGAL
& LEWIS,**

1719 Packard Building,
Philadelphia, Pennsylvania. 19102

**TESCHKE, BURNS, MALONEY
& McGUINN,**

One East Wacker Drive,
Chicago, Illinois. 60601

Of Counsel.

BERNARD G. SEGAL,

SAMUEL D. SLADE,

HERBERT G. KEENE, JR.,

*Counsel for Respondent,
United Insurance Com-
pany of America.*

INDEX.

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED	2
COUNTERSTATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	12
I. The Court of Appeals Correctly Concluded That, Under the Controlling Principle of Law, United's Debit Agents Are Independent Contractors and Not Employees Within the Meaning of the Act	12
A. The Controlling Principle of Law	13
B. The Facts	23
II. The Court of Appeals Properly Exercised Its Power of Judicial Review in Setting Aside the Board's Order	34
A. The Evaluation of the Record as a Whole	36
B. The Power to Draw the Ultimate Conclusion ..	52
III. The Board Erréd in Ordering United to Bargain With a Union Purporting to Represent a Unit Which, at the Worst, Was Half Employee and Half Inde- pendent Contractor	60
CONCLUSION	63
APPENDIX A	64

TABLE OF CITATIONS.

Cases:	Page
Allstate Insurance Co., 109 NLRB 578 (1954)	20
Bartels v. Birmingham, 332 U. S. 126 (1947)	17
Benson v. Social Security Board, 172 F. 2d 682 (C. A. 10, 1949)	18, 59
Boire v. Greyhound Corp., 376 U. S. 473 (1964)	15
Capital Life and Health Insurance Company v. Bowers, 186 F. 2d 943 (C. A. 4, 1951)	44
Carroll v. Social Security Board, 128 F. 2d 876 (C. A. 7, 1942)	59
Cody v. Ribicoff, 289 F. 2d 394 (C. A. 8, 1961)	59
Continental Bus System, Inc. v. N. L. R. B., 325 F. 2d 267 (C. A. 10, 1963)	16, 21
Delno v. Celebrezze, 347 F. 2d 159 (C. A. 9, 1965)	59
Enochs v. Williams Packing Co., 370 U. S. 1 (1962)	18
Ewing v. Vaughan, 169 F. 2d 837 (C. A. 4, 1948)	18, 59
Farmer Insurance Group, 143 NLRB 240 (1963)	20
Farmers Co-operative Co. v. N. L. R. B., 208 F. 2d 296 (C. A. 8, 1953)	51
Frito-Lay, Inc. v. N. L. R. B., 66 LRRM 2542 (C. A. 7, 1967)	21, 57
Goldberg v. Whitaker House Cooperative, Inc., 366 U. S. 28 (1961)	16
Golden State Agency, 101 NLRB 1773 (1952)	20
Gray v. Powell, 314 U. S. 402 (1941)	35
Hoosier Home Improvement Co. v. United States, 350 F. 2d 640 (C. A. 7, 1965)	18
In re Engineers Public Service Co., 221 F. 2d 708 (C. A. 3, 1955)	55, 56
Insurance Workers International Union, AFL-CIO v. N. L. R. B., C. A. 7, Case No. 16265	4
International Brotherhood of Teamsters, Chauffeurs, Ware- housemen and Helpers of America v. N. L. R. B., 280 F. 2d 665 (C. A. D. C. 1960)	22

TABLE OF CITATIONS (Continued).

Cases (Continued):

Page

Journeyman Plasterers Protective and Benevolent Society of Chicago v. N. L. R. B., 341 F. 2d 539 (C. A. 7, 1965) ...	58
Levin v. Manning, 124 F. Supp. 192 (D. N. J., 1952)	18
Lifetime Siding, Inc. v. United States, 359 F. 2d 657 (C. A. 2, 1966)	18
Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko, 373 U. S. 701 (1963)	57
Metropolitan Roofing and Modernizing Co. v. United States, 125 F. Supp. 670 (D. Mass., 1954)	18
Millard's, Inc. v. United States, 146 F. Supp. 385 (D. N. J. 1956)	18
Minnesota Milk Co. v. N. L. R. B., 314 F. 2d 761 (C. A. 8, 1963)	57
N. L. R. B. v. A. S. Abell Co., 327 F. 2d 1 (C. A. 4, 1964) ...	15, 21
N. L. R. B. v. E. C. Atkins & Co., 331 U. S. 398 (1947)	15
N. L. R. B. v. Barberton Plastics Products, Inc., 354 F. 2d 66 (C. A. 6, 1965)	51
N. L. R. B. v. Coca Cola Bottling Co., 350 U. S. 264 (1955) , .	58
N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111 (1944) 8, 13, 16, 17, 35, 48, 53	
N. L. R. B. v. Highland Park Manufacturing Co., 341 U. S. 322 (1951)	58
N. L. R. B. v. Keystone Floors, Inc., 306 F. 2d 560 (C. A. 3, 1962)	57
N. L. R. B. v. Mt. Vernon Telephone Corp., 352 F. 2d 977 (C. A. 6, 1965)	51
N. L. R. B. v. Norma Mining Corp., 206 F. 2d 38 (C. A. 4, 1953)	57
N. L. R. B. v. Phoenix Mutual Life Ins. Co., 167 F. 2d 983 (C. A. 7, 1948), cert. denied, 335 U. S. 845 (1948) ...	22, 48, 57
N. L. R. B. v. Pittsburgh Steamship Co., 337 U. S. 656 (1949)	

TABLE OF CITATIONS (Continued).

Cases (Continued):	Page
N. L. R. B. v. Pittsburgh Steamship Co., 340 U. S. 498 (1951)	36
N. L. R. B. v. A. Sartorius & Co., 140 F. 2d 203 (C. A. 2, 1944)	52
N. L. R. B. v. Servette, Inc., 313 F. 2d 67 (C. A. 9, 1962)	21, 22, 57
N. L. R. B. v. Seven-Up Bottling Co., 344 U. S. 344 (1953) ..	53
N. L. R. B. v. Steinberg, 182 F. 2d 850 (C. A. 5, 1950)	34, 57
N. L. R. B. v. Swift and Company, 292 F. 2d 561 (C. A. 1, 1961)	58
N. L. R. B. v. Walton Mfg. Co., 369 U. S. 404 (1962)	50
National Van Lines, Inc. v. N. L. R. B., 273 F. 2d 402 (C. A. 7, 1960)	21, 57
Office Employees International Union, Local No. 11, AFL-CIO v. N. L. R. B., 353 U. S. 313 (1957)	58
Party Cab Co. v. United States, 172 F. 2d 87 (C. A. 7, 1949) ..	18
Portable Electric Tools, Inc. v. N. L. R. B., 309 F. 2d 423 (C. A. 7, 1962)	51
Provident Life & Accident Insurance Co., 118 NLRB 412 (1957)	20
Rayhill v. United States, 364 F. 2d 347 (Court of Claims, 1966)	18
Republic Aviation Corp. v. N. L. R. B., 324 U. S. 793 (1945)	53
Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins, 189 F. 2d 865 (C. A. 2, 1951)	18
James S. Rivers, Inc. (WJAZ) v. Federal Communications Commission, 351 F. 2d 194 (C. A. D. C. 1965)	56
Saiki v. United States, 306 F. 2d 642 (C. A. 8, 1962)	59
San Antonio Light Division, The Hearst Corporation, 167 NLRB No. 99, 66 LRRM 1131 (1967)	21
S. E. C. v. Chenery Corp., 318 U. S. 80 (1943)	54, 56
S. E. C. v. Cogan, 201 F. 2d 78 (C. A. 9, 1952)	55, 56
Singer Manufacturing Co. v. Rahn, 132 U. S. 518 (1889)	19
Site Oil Co. of Missouri v. N. L. R. B., 319 F. 2d 86 (C. A. 8, 1963)	21, 22, 57

TABLE OF CITATIONS (Continued).

Cases (Continued):

Page

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 (1940)	58
Sterns v. Clauson, 122 F. Supp. 795 (D. Maine, S. D., 1954) ..	44
Texas Gas Corp. v. Shell Oil Co., 363 U. S. 263 (1960)	54, 55
Titanium Ores Corp. v. United States, 205 F. Supp. 606 (D. Md., 1962)	18
United Insurance Company of America v. N. L. R. B., 272 F. 2d 446 (C. A. 7, 1959)	3
United Insurance Company of America v. N. L. R. B., 304 F. 2d 86 (C. A. 7, 1962)	4, 41
United Insurance Company of America v. N. L. R. B., 371 F. 2d 316 (C. A. 7, 1966)	4
United Insurance Company of America v. N. L. R. B., C. A. 7, Case No. 16,006	4
United States v. Rosenwasser, 323 U. S. 360 (1945)	17
United States v. Silk, 331 U. S. 704 (1947)	17
Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951) 9, 10, 35, 36, 50, 52	
Victor Products Corp. v. N. L. R. B., 208 F. 2d 834 (C. A. D. C., 1953)	51
Zipser v. Ewing, 197 F. 2d 728 (C. A. 2, 1952)	44

Statutes:

Ann. Code of Md., Art. 48A § 166a	25
Ann. Code of Md., Art. 48A, § 167	24
Ann. Code of Md., Art. 48A, §§ 217-218	32
Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901-950	58
National Labor Relations Act, as amended, 29 U. S. C. §§ 141 et seq.:	
Generally	2, 3
Section 2(3)	2, 13
Section 10(e)	35, 54

TABLE OF CITATIONS (Continued).

Statutes (Continued):

	Page
26 U. S. C. § 1426(d)	17
26 U. S. C. § 1607(i)	17
26 U. S. C. § 3121(d)	17
26 U. S. C. § 3306(i)	17

Congressional Reports:

93 Congressional Record, p. 6599 (June 5, 1947)	14
H. Rep. 510, 80th Cong., 1st Sess., pp. 32-33	15
H. Rep. 1319, 80th Cong., 2d Sess.	17
S. Rep. 1255, 80th Cong., 2d Sess.	17
H. Rep. 1300, 81st Cong., 1st Sess., pp. 14-15	17

Authorities, Texts:

Jaffe, Louis L., Judicial Control of Administrative Action (1965), pp. 562, 607	52, 53
Liability of Insurance Company for Negligent Operation of Automobile by Insurance Agent or Broker, 36 A. L. R. 2d 261 (1954)	44
Restatement of the Law, Agency 2d, Section 220, pp. 485-488 (1958)	20

Nos. 178 & 179.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1967.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

UNITED INSURANCE COMPANY OF
AMERICA, ET AL.

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR UNITED INSURANCE COMPANY
OF AMERICA.

**COUNTERSTATEMENT OF THE
QUESTION PRESENTED.**

By a 1947 amendment to Section 2(3) of the National Labor Relations Act (29. U. S. C. 152(3)), Congress mandated that the distinction between independent contractor and employee under the Act was to be determined by reference to the general principles of the law of agency. The question here presented is whether the Court of Appeals correctly concluded, under the controlling principles and on the basis of an evaluation of the record as a whole, that the debit agents of United Insurance Company of America were independent contractors and that the National Labor Relations Board had erred in finding to the contrary.

COUNTERSTATEMENT OF THE CASE.

United Insurance Company of America (hereinafter called "United") is an Illinois corporation, founded in 1919, which writes commercial and industrial life, health and accident, and hospitalization insurance. The "debit agents" of this case contract with United to sell and service the policies on a commission basis. Continuously since 1953, the Insurance Workers International Union, AFL-CIO (hereinafter called the "Union"), has sought to represent these agents for purposes of collective bargaining, alleging that the agents are not independent contractors but rather, employees within the meaning of Section 2(2) of the National Labor Relations Act (hereinafter called the "Act" or the "Labor Act"), as amended, 29 U. S. C. §§ 141 *et seq.* United has consistently maintained, throughout the several proceedings initiated by the union, that its debit agents are *bona fide* independent contractors. This issue as to the status of United's debit agents has been presented to the United States Court of Appeals for the Seventh Circuit on three occasions within the past eight years.

On the first occasion, the Court of Appeals reviewed an order of the National Labor Relations Board (hereinafter called the "Board"), which required United to bargain with the Union as the representative of United's debit agents in Pennsylvania. Enforcement was refused on the ground that United had been denied procedural due process in the proceeding before the Board. The Court remanded the case to the Board " * * * for a full hearing and decision * * *". **United Insurance Company of America v. N. L. R. B.**, 272 F. 2d 446, 449 (C. A. 7, 1959).

After the proceeding on remand, the Board again ordered United to bargain with the Union as the repre-

sentative of the Pennsylvania agents. When the matter came before the Court of Appeals for the second time, that Court squarely met the basic issue of the independent contractor or employe status of United's debit agents and refused to enforce the Board's order, on the ground that United's debit agents were independent contractors within the meaning of the Act. The Court concluded that " * * * United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do. * * * " **United Insurance Company of America v. N. L. R. B.**, 304 F. 2d 86, 91 (C. A. 7, 1962). Neither the Board nor the intervenor Union sought review of this decision by this Court.

The present case is the third occasion on which the court below has considered the nature of United's operation. Here, the area involved is Baltimore City and Anne Arundel County, Maryland. The Board, after hearing, again ordered United to bargain with the Union as the representative of United's agents in that area. The court below, on review, again concluded that United's debit agents are independent contractors. **United Insurance Company of America v. N. L. R. B.**, 371 F. 2d 316 (C. A. 7, 1966); (A. 1231-1243).¹

Following the Court of Appeals 1962 decision, United entered into a reinsurance agreement in December, 1963, with Quaker City Life Insurance Company (hereinafter called "Quaker"), a Philadelphia, Pennsylvania corporation. Under the terms of the agreement, United agreed to

1. A fourth case involving this same issue and these same parties is presently pending before the same Court of Appeals awaiting the outcome of the present case. (**United Insurance Company of America v. N. L. R. B. and Insurance Workers International Union; AFL-CIO v. N. L. R. B.**, C. A. 7, Case Nos. 16,006 and 16,265.) A defense of prior adjudication, not technically available in the instant case since it involves a different territory, has been raised in this most recent case which, as in the 1962 case, involves United's Pennsylvania agents.

reinsure Quaker's outstanding policies in a number of states, including those in force in Baltimore City and Anne Arundel County, Maryland. Quaker had long maintained an employer-employee relationship with its debit agents, and such agents in Baltimore City and Anne Arundel County, Maryland, were represented by the Union. In March, 1964, when the reinsurance agreement became effective, Quaker terminated all of its employees including its debit agents in Baltimore City and Anne Arundel County, Maryland. Shortly thereafter, many of these former Quaker agents applied for and were granted independent agencies by United.²

Seventy-nine of the one hundred fifty-nine agents in the territory were former Quaker agents and were members of the Union. The Union, defeated in its earlier attempts to establish that United's agents were employees within the meaning of the Act, immediately seized the opportunity presented by this situation. Within three months of the effective date of the United-Quaker reinsurance agreement, the Union petitioned the Board for certification as the exclusive bargaining representative of all of United's agents in Baltimore City and Anne Arundel County, Maryland.

Following the procedure used in the Pennsylvania case, United and the Union entered into a stipulation for certification upon consent election. Paragraph 13 of the stipulation expressly reserved to United the right to raise the issue of the independent contractor status of its agents in any subsequent unfair labor practice proceeding initiated by the Union (A. 1047). Upon the Board's certification of the Union in August, 1964, United rejected the Union's re-

2. This case does not involve any question of the rights and obligations of a successor employer. That issue was raised by the Union in a separate proceeding which it instituted in January, 1964, in the United States District Court for the District of Columbia (Civil Action No. 57-64). The Union's complaint in that case was dismissed with prejudice by stipulation of the parties in March, 1966.

quest for bargaining on the ground that its agents were independent contractors within the purview of the Act. Thereupon, the Union instituted unfair labor practice proceedings, charging United with violating Section 8(a)(1) and (5) of the Act.

At the hearings conducted by the Board in December, 1964 on the Union's charges, General Counsel for the Board introduced the testimony of only two witnesses, both members of the Union and former Quaker agents. United presented the testimony of four debit agents, with from one to six years of experience as United agents, and the stipulated testimony of six additional agents. United also introduced the testimony of its General Counsel and Vice President, its Agency Vice President, and the Divisional Manager; whose division included Baltimore City and Anne Arundel County, Maryland.

In May, 1965, the Trial Examiner issued his decision and recommended order (A. 1122-1183). He indicated that he was not bound by the findings made in 1962 by the Court of Appeals (A. 997-998) and made contrary findings as to the nature of United's operation. In support of his conclusion that United's debit agents in Baltimore City and Anne Arundel County, Maryland were employees within the meaning of the Act, the Trial Examiner expressly relied, *inter alia*, upon his personal observations of off-the-stand demeanor allegedly exhibited in the hearing room by United's agents, including those who testified and those who did not (A. 1151-1152):

“ * * * [W]ithout exception the agents did not display or appear to have attributes of independence * * * but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard.

* * *

* * *

“* * * I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties.”

In July, 1965, the Board affirmed and adopted as its own the Trial Examiner's findings, conclusions and recommendations, and ordered United to bargain with the Union as the representative of its agents in Baltimore City and Anne Arundel County, Maryland (A. 1199-1200). In adopting the Examiner's ultimate conclusion, the Board disavowed reliance upon the Examiner's “observation * * * that the demeanor of the debit agents toward admitted supervisors during the hearing was one indicating an employer-employee relationship.” (A. 1200).

Both United and the Union filed petitions for review of the Board's order (A. 1201-1203, 1206-1209). These petitions, together with the Board's answer and cross-petition for enforcement of its order (A. 1204-1205, 1209-1210), were argued before the Court of Appeals in November, 1966. The decision of the Court of Appeals, setting aside the Board's order, was issued on December 21, 1966 (A. 1231-1244). Upon a careful examination of the entire record, the Court of Appeals concluded that there was “* * * no support in the record for some of [the Board's] findings and but tenuous support for others. * * *” (A. 1239). This Court granted the petitions for writs of certiorari of the Board (No. 178) and the Union (No. 179) on October 9, 1967 (A. 1245-1246).

SUMMARY OF ARGUMENT.

I.

On two occasions, the Court of Appeals for the Seventh Circuit has concluded, after a full examination of all facts of record, that United conducts its business through agents who are independent contractors, not employees. This conclusion has been reached by applying to the facts the test specifically established by Congress in 1947, directing that the distinction between employe and independent contractor for the purpose of the National Labor Relations Act be resolved by application of the principles of the law of agency. The action of Congress in 1947, in prescribing this specific test for determining status, was a direct repudiation of the earlier practice of the Board, sanctioned by this Court in the **Hearst** decision in 1944, of determining status on the basis of economic and policy considerations.

Since 1947, the courts, under the amendment provided by Taft-Hartley and under comparable provisions of the Social Security Act, have applied the familiar control test of the law of agency. Each case has been resolved on its own facts and the decisive question has been whether control was exercised over the manner and means of the occupation in question.

The Board, while bound to recognize the test imposed by Congress, has never, in reality, abandoned the position that it alone should determine the question of status on the basis of policy considerations within its own special field of activity. As a result, the Board has persistently attempted to classify different groups as "employees" on the basis of economic considerations which, in the Board's view, justify that classification, rather than on the objective application of the control test to the facts of each case. It

is this determination to classify occupations rather than to apply the agency law test to each case which accounts for the fact that United has been forced to explain and defend its operation continuously over a period of fourteen years. Throughout this extended period, United has shown again and again, that its operation, substantially the same in nature since the founding of the company in 1919, has been carried out through independent agents, that this method of operation has been a deliberate choice by United and that the method is not necessarily one employed by companies engaged in comparable lines of insurance business.

A fair and objective reading of all the facts of record establishes that, under the control test prescribed by Congress, United's agents are independent contractors. The facts which support this conclusion and upon which the court below relied are set forth and discussed in detail in the course of our argument, *infra*. Item by item, these facts establish that United is interested only in results and that United's agents, while they may obtain some assistance from the company if they desire, operate on their own in all significant respects.

II.

Before this Court, the Board cannot very well level a direct challenge to the test of status which Congress has imposed. However, the Board attempts to achieve the same result by means of an argument as to the function of the reviewing court which would, in substance, restore the Board to the position it occupied prior to the 1947 amendment.

The 1947 amendments to the National Labor Relations Act included a substantial change in the review provision of that Act, a change which was examined and given definition by this Court in the **Universal Camera** case in 1951.

In **Universal Camera**, this Court questioned whether it had ever been proper for a reviewing court to test an administrative order solely on the basis of the evidence which might support the order, and pointed out that, under the changed review provision of the National Labor Relations Act, as under the review provision of the Administrative Procedure Act, the reviewing court was assigned an important function which could be discharged only by an evaluation of all the evidence of record.

We submit that the Board's approach is wrong and that the court below possessed both the power and duty to evaluate the record as a whole. Of equal importance is the fact that the ultimate conclusion to be drawn from this evaluation involves the application of a test drawn from the law of agency as to which the court was at least as fully experienced as the Board. Even during the period when the role of a reviewing court was limited most narrowly, this Court recognized a broader authority where the resolution of the question for determination turned on the application of a familiar principle of law.

The court below, both in this case and in the earlier case involving the same question, carefully evaluated the record as a whole in coming to the conclusion that United's agents are independent contractors. This evaluation not only led the court below to confirm the result reached in its earlier consideration of United's operation but also impelled the court here to hold that the record was " * * * tainted with a flavor which precludes [the court] from conscientiously relying upon it as adequately supporting the Board's determination and order." (A. 1243).

III.

The Trial Examiner relied exclusively on testimony given by former Quaker employees who reported to Frank-

lin Street, a former Quaker location in Baltimore. He ignored or discounted the uniform testimony of old line United agents who reported to United's long established St. Paul Street office in Baltimore. He also ignored or discounted the effect of the confusion in procedure during the period following the execution of the United-Quaker reinsurance agreement. In this circumstance, the Board erred in ordering United to bargain with all of its agents in Baltimore City and Anne Arundel County, Maryland, basing the order on the Franklin Street testimony only. The unit involved was composed, at worst, half of employes and half of independent contractors.

Argument.

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER THE CONTROLLING PRINCIPLE OF LAW, UNITED'S DEBIT AGENTS ARE INDEPENDENT CONTRACTORS AND NOT EMPLOYES WITHIN THE MEANING OF THE ACT.

The basic argument of the National Labor Relations Board in this case was foreshadowed by the presentation made in the Board's petition for certiorari. There, the Board argued that a ruling in this case is important " * * * to all insurance agents, and, beyond that, to the countless individuals who, although they work for a single company, under the company's direction and control, do so for the most part 'on their own'—a class that includes, for example, traveling salesmen, collection agents, newsboys and milkmen. * * *" (Pet., p. 12).³

Lines of argument, raising questions as to the appropriate scope of review, are also advanced by the Board in its brief on the merits here. But such arguments, on analysis, are merely alternative paths to the one basic position urged by the Board. In essence, the Board has here advanced a test whereby overriding policy considerations—the Board's view of the position in the economy of the particular group involved—are to be given controlling effect in determining whether United's agents are independent contractors or employees. In substance, this is no

3. The petition for certiorari filed by the Union is to the same effect, stating that " * * * the grounds upon which the decision rests are not and cannot be confined to this particular employer or this particular record. * * *" (Pet., p. 11).

more than a reassertion of the position taken by the Board on the issue of employe status prior to the 1947 amendment of Section 2(3) of the Act.

We submit that this position of the Board is incorrect. We do not argue that the general purposes of the Act are to be put aside and a case involving the issue of employe status decided as though it arose at common law. We do argue that Congress has categorically rejected the view now urged upon this Court by the Board. The statutory standard for resolving the question whether status is that of an independent contractor or employe must be given full recognition. A case which involves that issue cannot be made to turn on categories of employment as determined by the Board. Thus, as the Court of Appeals properly recognized, the resolution of the issue of status in this case does not determine the question of status as it might arise in cases involving other insurance companies, let alone " * * * travelling salesmen, collection agents, newsboys and milkmen. * * *".

The only explanation for the long assault on United's operation is, we submit, the Board's determination that it should have the power, on the basis of those considerations which it deems most important, to fix categories of employment for the purpose of coverage under the Act. But this is the very power which Congress has denied to the Board. On two occasions the Court of Appeals, by application of the appropriate statutory standard, has correctly held that the Board erred in concluding that United's agents are employes within the meaning of Section 2(3) of the Act.

A. The Controlling Principle of Law.

In *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111 (1944), this Court rejected the contention that "common law standards" governed the distinction between "em-

employees" and "independent contractors" under the Act and held that "Whether * * * the term 'employee' includes [particular] workers * * * must be answered primarily from the history, terms and purposes of the legislation. * * *" 322 U. S. at 124. This Court stated that (322 U. S. at 124, 126, 129):

"* * *. Congress had in mind a wider field than the narrow technical legal relation of 'master and servant' * * *. The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors'. * * * [T]he broad language of the Act's definitions which in terms reject conventional limitations on such conceptions as 'employee', * * * leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications. * * *"

Congressional reaction to this construction of the Act was adverse. Accordingly, Congress amended the Act specifically to exclude "any individual having the status of an independent contractor" from the definition of "employee" contained in Section 2(3) of the Act and directed the Board and the Courts thenceforth to apply "the general principles of the law of agency"⁴ in distinguishing between employees and independent contractors under the Act. The House Committee Report on the bill stated:

"* * *. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now,

4. 93 Congressional Record, p. 6599 (June 5, 1947).

that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'. . . ." H. Rep. No. 245, 80th Cong., 1st Sess., p. 18.⁵

Senator Taft stated that the " * * * legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency. * * * " ⁶

In **Boire v. Greyhound Corp.**, 376 U. S. 473, 481, n. 10 (1964), this Court observed that the " * * * effect of this provision was to overrule *Labor Board v. Hearst Publications*, 322 U. S. 111. * * * " Although this Court there referred, in passing, to the common law test of "control" determinative of employee or independent contractor status under the Act, this Court has not had occasion, since the amendment of 1947, to review a case involving that amendment.⁷ However, the issue of employee or independent contractor status under the amendment has been presented to the various courts of appeals on several occasions. And the courts of appeals have uniformly held, in these cases, that " * * * [c]ommon law tests are to be used to distinguish between the two. * * * " ⁸ While due regard must be had for the purposes of the Act, nevertheless agency principles

5. See also, H. Rep. 510, 80th Cong., 1st Sess., pp. 32-33.

6. See footnote 4, *supra*.

7. **N. L. R. B. v. E. C. Atkins & Co.**, 331 U. S. 398 (1947), upon which the Board places reliance (Br., p. 29), was decided before the Act was amended.

8. **N. L. R. B. v. A. S. Abell Co.**, 327 F. 2d 1, 4 (C. A. 4, 1964) and cases cited therein.

constitute the controlling test in distinguishing between employees and independent contractors under the Act.⁹ A reading of this Court's decision in **N. L. R. B. v. Hearst Publications**, *supra*, coupled with the resulting Congressional amendment and its legislative history, clearly demonstrates this to be the correct approach.¹⁰

Both the Board and the Union rely upon decisions of this Court, interpreting the term "employee" under the Fair Labor Standards Act and the Social Security Act, as enunciating the proper standard of law to be applied in determining employe status under the Labor Act (Board's Brief, p. 18; Union's Brief, pp. 53-54). The Fair Labor Standards Act decisions are not pertinent. The Social Security Act decisions fully support United's position here.

The most recent decision of this Court, under the Fair Labor Standards Act, **Goldberg v. Whitaker House Cooperative, Inc.**, 366 U. S. 28, 33 (1961), concludes that " * * * the 'economic reality' rather than 'technical concepts' is to be the test of employment * * *" under that Act. United has no quarrel with the application of such a test under the Fair Labor Standards Act. In that Act, Congress neither expressly directed that the general principles of the law of agency should be the controlling criteria in determining employe status under that Act nor saw fit to amend the Act so as specifically to exclude "independent contractors". Indeed, the definition of "employee" contained in the Fair Labor Standards Act has been described as " * * * the broadest definition that has ever been in-

9. See, *e.g.*, **Continental Bus System, Inc. v. N. L. R. B.**, 325 F. 2d 267, 271 (C. A. 10, 1963) and cases cited therein.

10. As to the Board's view, see p. 19, *infra*, fn. 14. The Union candidly contends that the purposes of the Act remain the primary consideration while the common law test is no more than an additional consideration. United submits that this is just another way of stating the test enunciated in **Hearst** and rejected by Congress. See Un. Br., p. 52.

cluded in any one act." **United States v. Rosenwasser**, 323 U. S. 360, 363, n. 3 (1945).

The test to be used in determining employe status under the Labor Act and the Social Security Act is plainly more restrictive. In 1948, Congress amended the Social Security Act to provide that the term "employee" " * * * does not include (1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor * * * ".¹¹ Prior to Congressional amendment of that Act, this Court had held that the policy and purposes of the Act, rather than common law standards, constituted the primary consideration in determining the existence of the employment relationship. **United States v. Silk**, 331 U. S. 704 (1947); **Bartels v. Birmingham**, 332 U. S. 126 (1947). This is, of course, the same test as was enunciated by this Court in **N. L. R. B. v. Hearst Publications**, *supra*. The 1948 amendment of the Social Security Act was intended to have the same effect as the 1947 amendment of the Labor Act.¹² Each amendment was intended to override this Court's reliance upon the "economic reality" test and to reestablish the primacy of the agency law test of "right of control" in determining employe status.

11. 26 U. S. C. § 1426(d). This provision, as further amended in 1950, now appears at 26 U.S.C. § 3121(d) and provides, in pertinent part, that: " * * * the term employee means * * * any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or * * * (3) any individual * * * who performs services for remuneration for any person * * * (B) as a full-time life insurance salesman * * * ". The specific reference to insurance salesmen, in defining "employee", was thought necessary on the ground that, under the common law test, such salesmen would not be considered to be employees. H. Rep. 1300, 81st Cong., 1st Sess., pp. 14-15. 26 U. S. C. 1607(i), which now appears at 26 U. S. C. § 3306(i), defining "employee" under the Federal Unemployment Tax Act, is identical in language with the former 26 U. S. C. § 1426(d).

12. See S. Rep. 1255, 80th Cong., 2d Sess.; H. Rep. 1319, 80th Cong., 2d Sess.

In **Enochs v. Williams Packing Co.**, 370 U. S. 1, 3 (1962), this Court stated that Congress “* * * specifically adopt[ed] the common-law test for ascertaining the existence of the employer-employee relationship * * *” under the Social Security Act. The federal courts have explained that

“* * * Congress regarded the broadening scope of the term ‘employee’, as contained both in the Social Security Act and in the Labor Act, as an usurpation by the courts and the administrative agencies of the Congressional legislative function. * * * Congress intended to and did materially limit the term ‘employee’ as it had been construed and applied by the administrative agencies and the courts. It established in plain and certain terms that the common law test and that only was to be applied, and again and again in the committee reports it is stated that the common law rules to be invoked must be ‘realistically applied.’”

Party Cab Co. v. United States, 172 F. 2d 87, 91 (C. A. 7, 1949).¹³

The identically worded amendment of the Labor Act in 1947 likewise requires that common law principles, realis-

13. See also, **Millard's, Inc. v. United States**, 146 F. Supp. 385, 388 (D. N. J., 1956) “* * * it must be considered settled law ‘that the usual common law rules, realistically applied, must be used to determine whether a person is an “employee” for purposes of applying the Social Security Act * * *’”; **Rayhill v. United States**, 364 F. 2d 347 (Court of Claims, 1966); **Lifetime Siding, Inc. v. United States**, 359 F. 2d 657 (C. A. 2, 1966); **Benson v. Social Security Board**, 172 F. 2d 682 (C. A. 10, 1949); **Ewing v. Vaughan**, 169 F. 2d 837 (C. A. 4, 1948); **Titanium Ores Corp. v. United States**, 205 F. Supp. 606 (D. Md., 1962); **Metropolitan Roofing and Modernizing Co. v. United States**, 125 F. Supp. 670 (D. Mass., 1954); **Levin v. Manning**, 124 F. Supp. 192 (D. N. J., 1952). But see **Hoosier Home Improvement Co. v. United States**, 350 F. 2d 640 (C. A. 7, 1965) and **Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins**, 189 F. 2d 865 (C. A. 2, 1951).

tically applied, be the controlling test in determining employee or independent contractor status under the Labor Act.

The common law test for determining the existence of the employment relationship was succinctly stated by this Court long ago in **Singer Manufacturing Co. v. Rahn**, 132 U. S. 518, 523 (1889):

“* * * the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, ‘not only what shall be done, but how it shall be done.’ *Railroad Co. v. Hanning*, 15 Wall. 649, 656.”¹⁴

In this case, the Court of Appeals, quoting from its 1962 decision involving United’s debit agents, stated (A. 1235):

“* * * that the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. * * * the critical

14. As we have pointed out, this Court has noted, both as to the 1947 amendment to the Labor Act and the 1948 amendment to the Social Security Act, that the distinction between individual contractor and employee status was to be resolved by the common law test of control. pp. 17-18, *supra*. The Board, while seemingly accepting the 1947 amendment to the Labor Act, attempts to construe its scope so as to broaden its coverage beyond the familiar common law test. Thus, the Board infers that the control test, developed in the law of torts, is only appropriate for the determination of coverage under the Labor Act if it be complemented by what the Board calls “* * * the subsequent infusion of flexibility * * *” (Br., p. 17, ftn. 18). No authority is cited by the Board in support of this variation of the statutory test.

distinction between employees and independent contractors under the Act is the right to control the manner and means by which the agent conducts his business.

* * *

In determining whether the requisite control of manner and means is present or absent, various factors must be examined, *e.g.*, the right to hire and discharge, the method of payment, who furnishes the tools and materials used, who designates the time and place for the work to be done, and the intention of the parties. The **Restatement of the Law, Agency 2d**, Section 220, pp. 485-486 (1958), states that other factors, such as the extent of control over details permitted the master by the agreement, the nature and duration of the work, the skill required in the work, and the business of the principal, should also be considered "in determining whether one acting for another is a servant or an independent contractor".¹⁵

Close examination of its decision reveals that the Board did not, in fact, apply the control test as decisive but rather substituted its "rule of thumb" that debit agents, as a group or occupational class, are of necessity employees. See pp. 23-24, *infra*. The Board's affinity for this "rule" is well documented. The Board has never, in a single case, held debit agents, or for that matter any insurance agents, to be independent contractors rather than employees.¹⁶ So

15. Section 220 of the Restatement, pp. 487-488, states " * * * The important distinction [between a servant and an independent contractor] is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results * * * . Those rendering service but retaining control over the manner of doing it are not servants * * * ."

16. See, *e.g.*, **Farmer Insurance Group**, 143 NLRB 240 (1963); **Provident Life & Accident Insurance Co.**, 118 NLRB 412 (1957); **Allstate Insurance Co.**, 109 NLRB 578 (1954); **Golden State Agency**, 101 NLRB 1775 (1952).

certain is the Board of the employe status of all debit and other insurance agents that it " * * * has fashioned general principles of appropriate bargaining unit determination applicable to such agents. * * *" (Un. Br., p. 60). Clearly, such an approach is not in keeping with the test laid down by Congress for determining employe status under the Act.

The Board's reluctance to accept the control test, in determining employe or independent contractor status in contexts other than debit or other insurance agents, has resulted in several reversals of Board findings of employe status within recent years. See, *e.g.*; **N. L. R. B. v. A. S. Abell Co.**, 327 F. 2d 1 (C. A. 4, 1964) (newspaper carriers); **Frito-Lay, Inc. v. N. L. R. B.**, 66 LRRM 2542 (C. A. 7, 1967) (route distributors); **National Van Lines, Inc. v. N. L. R. B.**, 273 F. 2d 402 (C. A. 7, 1960) (contract-drivers); **Site Oil Co. of Missouri v. N. L. R. B.**, 319 F. 2d 86 (C. A. 8, 1963) (lessees of service stations); **N. L. R. B. v. Servette, Inc.**, 313 F. 2d 67 (C. A. 9, 1962) (driver-salesmen); **Continental Bus System, Inc. v. N. L. R. B.**, 325 F. 2d 267 (C. A. 10, 1963) (operator of bus terminal). In each of these cases, as here, the Board's decision was framed in terms of "control"; but in each of these decisions, as here, the Board failed realistically to apply the test it routinely purported to follow.¹⁷

Here, the Board gave weight only to those factors which, in its opinion, indicated that the requisite right of control might have existed.

The many factors, which plainly indicated that the requisite right of control did not in fact exist, were explained away as merely evidencing a failure by United to exercise a reserved right to control. Such "boot-strap" reasoning,

17. See also, **San Antonio Light Division, The Hearst Corporation**, 167 NLRB No. 99, 66 LRRM 1131 (1967), a very recent Board decision which purports to apply the control test but plainly does not.

designed to achieve a preordained result, is hardly an appropriate substitute for a just and impartial appraisal of all the facts of record. The Board's use of such a one-sided approach has twice been rejected by the Court of Appeals upon its review of the record. In each case, the Court of Appeals observed that the conclusion as to employee or independent contractor status under the Act " * * * must be based on the 'total situation' looking at all of the facts in the particular case." (A. 1235).

All debit agents are not, simply by virtue of their being debit agents, employees within the meaning of the Act. Nor, admittedly, are all debit agents independent contractors. While the very nature of certain activities compels the conclusion that those engaged in them are employees, United submits that there are many others—and the selling of insurance is one of them¹⁸—in which management may make a genuine choice as to the manner, in which they are to be conducted. The management of an insurance company may, as in **N. L. R. B. v. Phoenix Mutual Life Ins. Co.**, 167 F. 2d 983, 987 (C. A. 7, 1948), choose to conduct its business by exercising close control over every detail of its salesmen's work with the result that such salesmen are placed " * * * in a somewhat different class than ordinary insurance salesman * * * ". On the other hand, the management of an insurance company may, as here, choose to operate its business through independent contractors " * * * and, of course, it had the complete legal right so to do" (A. 1235).

18. For other such businesses, see **Site Oil Co. of Missouri v. N. L. R. B.**, 319 F. 2d 86, 93 (C. A. 8, 1963) (lessees of service stations); **N. L. R. B. v. Servette, Inc.**, 313 F. 2d 67, 71 (C. A. 9, 1962) (driver-salesmen); **International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N. L. R. B.**, 280 F. 2d 665, 666 (C. A. D. C. 1960) (driver-salesmen).

A fair and objective application of the control test to the facts of the present case readily demonstrates, as the Court of Appeals correctly concluded, that United's debit agents are independent contractors and not employees within the meaning of the Act.

B. The Facts.

1. *The Agents Are "On Their Own"*. They set their own hours of work and their own workdays; they make their own arrangements with policyholders respecting the frequency of premium payments and they select their own methods as to collection of premiums and solicitation of new business (A. 238-239, 342-343, 372-373, 398-399, 402-403, 408-409, 415, 448-500, 518-519, 835-836). General Counsel for the Board conceded that these facts are true (A. 833-834).

The agents are not told what policies to sell or what prospects to call on for new business (A. 178-181, 192-194). The agents have no quota to meet (A. 286). They are not told where to seek new business, nor does United give them any leads (A. 698).

2. *The Agents Are Not Assigned "Territories"*. There is no geographical limitation or boundary imposed by a debit book.¹⁹ The areas represented in various debit books may and do overlap (A. 216-219, 695-696, 816-817, 834). United does not make a calculated effort to arrange a debit so that the agent is working in a given geographical area, but some agents do so themselves by voluntarily transferring policyholders to other agents, as when a debit area becomes so widespread that, in the opinion of the

19. A "debit book" contains the names and addresses of, and data concerning, policyholders serviced by an agent. The term "debit" is sometimes used to refer to the area embraced by the addresses contained in the book at any given time.

agent, it becomes difficult to service. This transfer of policyholders from one agent to another is done by the agents, for their own convenience, and without any restriction or limitation by United (A. 251, 255-256, 259-262, 307-308, 312-315, 511-513, 697-698, 715-718, 839-840).

The General Counsel's principal witness, Chairman of the Union Local (A. 255),²⁰ testified with respect to three isolated incidents in which policy transfers were not effectuated; each incident involved former Quaker agents at the former Quaker location in Baltimore, during the confusion of the first weeks following the effective date of the United-Quaker reinsurance agreement. At most, these occurrences constitute the rare exceptions to an established rule reflected in hundreds of other cases (A. 249-251, 359-362, 512-513). On cross-examination, even General Counsel's principal witness admitted that fifty-five policies were routinely transferred to him by other agents during his preparation for this case. He further conceded that he had freely transferred "dozens" of policies since becoming an agent for United (A. 251, 312-315).

3. *The Agents May Solicit Anywhere.* The agents are free to solicit and obtain business anywhere, subject only to the limitations imposed by the insurance laws of Maryland (see, e.g., Ann. Code of Md., Art. 48A § 167; A. 217, 411, 693-697). In Maryland, as in most states, an agent must be licensed to sell insurance and the license covers

20. The Board and the Union rely almost exclusively upon the testimony of this one witness (Scott). The only other witness called by the Board, also an active member of the Union and a former Quaker agent, testified only very briefly. " * * * [T]his particular record makes clear that the Quaker City agents, who had acted together as a Union before [United] took over, * * * continued to do so thereafter * * * [with] [a]gent Scott * * * as the collective spokesman * * * " (Un. Br., p. 41).

specific types of insurance for a specific company (Ann. Code of Md., Art. 48A § 166a; A. 880).

4. *The Agents Are Required to Pay Their Own Business Expenses.* The agents are required to pay their own expenses, such as transportation, advertising, business cards, postage, and gifts or favors for policyholders or prospects (Ex. R. 2; A. 230-233, 431-432, 507-508, 540, 617-618, 706-709, 757-761, 835, 851-852, 1114). The fact that brochures describing United's policies and, infrequently calendars and matchbooks, are available to the agents, if they wish to use them, is obviously of little significance (A. 113-120, 747-748). Similarly, the fact that when, as relatively infrequently occurs, a policy holder mails his premium, together with his premium receipt book, in to the district office, the district office, in order to accommodate the policyholder, returns the premium receipt book to the policyholder at Company expense, is of little or no significance (A. 97-98, 725). Where an agent's debit requires him to cover a large, outlying area, he may receive an additional one percent commission on collections. However, this additional one percent commission varies from week to week with the amount of the agent's collections, not with travel expenses, and therefore plainly constitutes additional commission and not reimbursement for travel expenses (A. 375, 409-410, 519-520, 617)..

5. *The Agents Report Only Results.* Agents are not required to make any specific number of collection calls per day or per week, nor to report to United the number of collection calls they do make (A. 699-702). They are not required to make any specific number of new business calls per day or per week, nor to report to United the number of such calls they make (A. 731). The agents are not required to report the number of hours worked, the number of days worked, or the specific days in the week worked or not

NCR



**MICROCARD[®]
EDITIONS, INC.**

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHE
901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

CARD

7

worked. General Counsel for the Board conceded that all of this is true (A. 840).

The reporting forms used by the agents (Agent's Weekly Account, Ex. GC 10, A. 1060-1061 and Abstract of Agent's Weekly Report, Ex. GC 12, A. 1064) plainly demonstrate that the agents report only results and not the manner and means by which their results are achieved. The reports are necessary to keep United informed of its insurance obligations, the amount of premium due, and the amount of commission earned by the agent (A. 419-421). Reports of lapsed policies and certain insurance applications are filed with United for the same reason (A. 81-85, 93-94). United offered to show that, where its policies are sold through large general agency organizations, virtually identical reports are filed (A. 672-682). As the Court of Appeals noted in the 1962 case, the " * * * reports mentioned by the Examiner are no more significant than would be the situation where a manufacturer requires reports from its manufacturers' representative." (304 F. 2d 86, 90).

United requests the agents to report their results to the district offices by Thursday or Friday of each week because those offices must themselves report by the following Monday or Tuesday. However, the agents may report on any day they choose and may do so by mail if they wish (A. 449-451, 505-506, 842-845, 856-857). The testimony of General Counsel's witness Scott that United instructed him to report to his district office each Thursday morning at 8:30 A. M. was placed in proper perspective when he was forced to admit that the only "instruction" he had reference to occurred in the course of a private conversation with his district manager a few days after both he and his district manager had come to United from Quaker (A. 202-208). Finally, some agents go to the district office from time to time in order to check the "life register"

and pick up "office pays" and new policies, but this is not required (A. 61-63, 236-237, 318-320, 422-423).

6. *The Agents Are Free to Engage in Additional Occupations.* The agents may engage in additional occupations including the sale of competing companies' insurance policies (A. 410, 705, 864). General Counsel's witness Scott admitted on cross-examination that, after becoming an agent for United, he had sold a quarter of a million dollars worth of life insurance for another company (A. 189-191, 291-292).

7. *The Agents May Set Up Their Own Offices and Hire Their Own Assistants.* The agents may, if they desire, set up offices in their homes, or elsewhere, and may hire assistants, at their own expense, to aid in collecting premiums (A. 410, 708-710, 759-760, 866-867). Many agents use rooms in their homes either exclusively or partially as offices. There, they have desks, phones, sometimes typewriters, adding machines, files, stationery, etc. The cost of the maintenance of such facilities, and also all the various business expenses personally incurred by the agents, are deducted as business expenses by the agents in their income tax returns (A. 230-232, 725, 866-867). The Board's finding that an agent may not "hire an unlicensed person to make collections for him" (A. 1140) confuses collection of premiums, for which no license is required, with sales of insurance, for which the State requires a license whether one sells on his own behalf or on behalf of another (A. 456-457). The Board's finding that, in any event, freedom to hire assistants to aid in collecting premiums does not support " * * * the claim of independent status" (A. 1140) is patently erroneous under general principles of agency law.

8. *The Agents Do Not Have Free Use of District Office Facilities.* United does not supply its agents with

"rent", "office space", or "telephones". United permits its agents to use the facilities of its district offices, including desk space if available, for preparing reports, but does not permit the agents to use these facilities for the general conduct of their business (A. 298-299). United's district offices are necessary as centers to receive reports; any other use of them by the agents is incidental and minimal (A. 458-459, 873). General Counsel's witness Scott was compelled to admit that he did not even have a key to the district office (A. 121); that the tables and chairs in the district office were for common use by anyone (A. 298-299); that he spent only three to four hours per week in the district office (A. 318); and that the only clerical help rendered the agents by district office employees was the occasional acceptance of a telephone message or the writing of a note (Ex. GC 26; A. 123, 300-302, 1097).

9. *The Agents Are Compensated Solely by Commissions.* The agents receive no salary, advance, or draw, but are compensated solely by commissions on premiums collected, on new business, and on increases in business and collections (A. 424-425, 429-430). An agent's commission with respect to existing and new policies is determined by a formula set forth in the "Agent's Commission Plan" (Ex. GC 6; A. 1051-1057). The amount of commission that an agent may earn depends on his industry and ambition (A. 195-199, 706, 746). The annual income of United's agents in Baltimore City and Anne Arundel County, Maryland ranges between \$7,000 and \$20,000 (A. 414).

10. *The Agents Receive Little Training or Assistance.* United's debit agents are engaged by district managers, who interview prospective agents. Each new agent executes a contract with United and is given a debit book (Ex. GC 6; A. 174, 194, 618, 696-697, 1051-1059). If a new agent has not had experience in selling insurance, United

explains the various policies which it has available, the rates and the reports filed with United, and frequently introduces the new agent to some of the existing policyholders (A. 459). If a new agent has had experience in the insurance field, United only explains the policies available, the rates, and the various report forms (A. 727, 855).

For administrative purposes, each agent is placed on the "staff" of an assistant manager. The agents may not be transferred from one "staff" to another without their consent (A. 417). The unconsented transfers testified to by General Counsel's witness Scott occurred shortly after United's execution of its reinsurance agreement with Quaker at a time when United was compelled to review its entire district office organization in Baltimore City and Anne Arundel County, Maryland (A. 366-371, 556).

When an agent does not produce desirable results, an assistant manager will offer to accompany the agent, but ordinarily does not do so without the agent's consent (A. 233-234, 309-310, 484-485, 516-518, 743-744). Assistant managers do not accompany agents on a regular basis (A. 460-461), nor are there any specific instructions to the assistant managers as to how they should attempt to aid the debit agents (A. 561-563). An assistant manager, if available, will service an agent's debit, when he is known to be absent or ill (A. 320, 427-428, 475-477, 656-657, 709-711). On the days when the agents submit their weekly reports to United, an assistant manager will frequently hold an informal meeting of the agents who are present to discuss their results and to suggest sales techniques (A. 522-523, 533). However, attendance at such informal meetings is not required, and United takes no action in the case of agents who elect not to participate (A. 703, 742-743, 865).

11. *The Agents Are Required Only to Produce Reasonable Results and to Report Them.* The contract of each

agent is terminable at will by either United or the agent (Ex. GC 6; A. 1058). Since the agent contracts to produce results, his agency may be terminated if he does not produce results to the extent that may reasonably be expected. Of course, an agency may also be terminated for embezzlement or for excessive shortages in accounts (A. 442-443, 568-569). United examines an agent's debit book only when a serious shortage or some "wrongdoing" is evident (A. 567-572). The agent's weekly collection reports are checked solely for arithmetical purposes, but the agents' right to take their net commissions out of their collections is not in any way dependent upon completion of such check (A. 54-55, 194-196, 481, 483). Obviously, in any case where an agent collects money and remits net to his principal, the principal has a right to an accounting. Particularly is this true here, where, because of the very lack of United's control over its agents, the facts are almost exclusively within the agents' knowledge. United offered to show that it also examines its general agencies' books which reflect the collection of premiums and retention of commissions by those organizations (A. 672-674, 687). In remitting the amount of his collections to United, the agent need not turn in cash; money orders and checks are accepted (A. 450-451). At least one agent has continually used his personal check for this purpose (A. 704). Collections, like the reports which accompany them, need not be personally brought to the district office; they may be mailed in by the agent (A. 451).

12. *The Agents Receive No Paid Vacations, Holidays or Sick Leave.* The agents receive no paid vacations, holidays, or sick leave (A. 427-428, 475-476, 709). The "Agent's Commission Plan" permits an agent to take time off, with compensation based upon results achieved by the agent over a prior period of time (Ex. CG 6; A. 475-477,

1053-1054). The agents decide themselves if and when they will take time off (A. 320, 710-711). If an agent takes time off and requests an assistant manager to service his debit for him in his absence, an assistant manager will do so if available (A. 475-477). When absent or ill, agents may, and some do, hire other persons to service their debits (A. 410, 565-567, 788).

13. *The Agents Bear the Risk of Loss.* United does not reimburse its agents for bond premiums. The agents bear the risk of financial loss with respect to "hold-up" shortages (Ex. R. 1, 3, 4; A. 311-312, 430-431, 580-581, 1113-1116). In addition, the agents are responsible for unpaid premiums on lapsed policies in accordance with the terms of the "Agent's Commission Plan" (A. 143-146).

14. *The Agents Are Subject to No Payroll Deductions.* United does not withhold federal, state, or local income taxes, or payments for pension, welfare, or group life insurance from commissions earned by the agents. If an agent does not wish any of these items to be handled through United, they are not. However, as an accommodation to an agent, United will, at the agent's request, accept payments from the agents for these items, and with respect to income taxes, accumulate and, at the appropriate time, transmit such moneys to the tax authorities (A. 546-553, 704-705, 839, 889-890). Participation in United's group insurance and profit-sharing pension plans is on a strictly voluntary basis and United and the individual agent contribute equally to these plans (Ex. GC 36; A. 71-73, 546-552, 711, 890-891, 1098-1104).

The agents qualify for participation in United's profit-sharing pension plan as independent contractors under Section 7701(a)(20) of the Internal Revenue Code. Under this Section, the term "employee" is defined to include all full-

time life insurance salesmen whether they be employees or independent contractors. An identical provision is found in Section 3121(d)(3)(B) of the Internal Revenue Code requiring Social Security deposits for all full-time life insurance salesmen whether they be employees or independent contractors. Pursuant to this requirement, and only because of it, United contributes its share of the Social Security tax on behalf of its insurance agents. The individual agent's share of this tax is remitted by each agent to United (A. 69-70, 884-889). However, United does not pay unemployment compensation taxes or provide workmen's compensation for the agents, since in these instances, payments are required only with respect to employees (A. 890, 903-904).

15. *The Agents Are Not Required to Use United's Business Forms.* United furnishes the agents with various business forms, but the agents have freedom of choice as to whether to use these forms (A. 282-291), except for the weekly report forms. Only here are agents required to use the company's forms (A. 419-421). Clearly, a requirement by a national company that its agents report results in a uniform manner does not indicate any significant amount of control over the agents' manner and means of conducting their business. Uniformity of report forms results solely from size and a desire for efficiency, and has no relevance to the determination of the existence *vel non* of the employment relationship.

16. *The Agents Are Free to Advertise and Process and Pay Claims.* Materials advertising United's insurance policies are supplied to the agents because the law of Maryland, as well as federal law with respect to false advertising, imposes penalties on the Company for misleading insurance advertisements (Ann. Code of Md., Art. 48A,

§§ 217-218; A. 884).. To avoid violation of law, United makes approved advertising material available to the agents. On the other hand, the name cards and the giving of promotional gifts are entirely within the control and are at the expense of the agents (Ex. R. 2; A. 1114). Agents are also free to process and pay policyholders' claims if they so wish. When an agent elects to make advance payment of claims, he is free to do so but at his own risk. Many agents do this, because it helps them to obtain and retain business (A. 277, 473-474, 516, 521-522, 703-704; 838-839, 846-850).

17. *Other Factors.* The rate manuals supplied to the agents are nothing more than "price list[s]". 304 F. 2d 86, 90. United's bare ownership of the agents' debit books is certainly without any significance in determining United's right to control the agents' manner and means of conducting their business. In brief, the "tools" of United's agents are "their own initiative and personality"; they still "work on their own time and at their own expense." 304 F. 2d 86, 90. The rate book merely sets forth certain prohibitions and regulations prescribed by state law; advises the agents of the types of risks which United will insure; and contains recommendations as to the selling and servicing of United's policies (Ex. GC 19; A. 92-93, 487-488, 893-894, 1068-1069).

In sum, United's debit agents are "on their own", using their own initiative and personality, to make as much, by way of commissions, as they can; they pay their own travel expenses, advertising, and gift expenses, rent, postage and telephone expenses, bond expenses, and the salary of any assistants (Ex. R. 2; A. 311-312, 410, 708-709, 866); they may take holidays when desired, without notice to United (A. 320, 427-428, 475-476, 709); they are not required to perform any function with regard to claims for

insurance benefits (A. 473-474, 516, 521-527, 703-704, 838-839); they may transfer policies with other agents but are not required by United to do so (A. 251, 255-256, 259-262, 307-308, 697-698, 715-718); they retain their own commissions from collected premiums, sending only the balance to United (A. 194-195, 696-697); and with respect to selling insurance, they are free to follow the assistant managers' suggestions or to devise their own means and methods (A. 460-461, 561-565).

United submits that the mere recital of these facts, without more, demonstrates the correctness of the Court of Appeals' conclusion that, under the "right of control" test, United's agents are independent contractors and not employees within the meaning of the Act. United has not reserved the right to direct and control the manner and means—the methods—by which its agents conduct their business. United is solely concerned with the results—the collections and sales—accomplished by its agents. " * * * [A]n employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee." *N. L. R. B. v. Steinberg*, 182 F. 2d 850, 856-857 (C. A. 5, 1950).

II.

THE COURT OF APPEALS PROPERLY EXERCISED ITS POWER OF JUDICIAL REVIEW IN SETTING ASIDE THE BOARD'S ORDER.

As indicated at the outset of our argument, pp. 12-13, *supra*, the Board's contentions as to the function of a reviewing court furnish no more than an alternative path to the Board's ultimate position that it must be left free to fix the status of United's agents. To make this argument in

terms of the reviewing power of a court, the Board reverts (Br., pp. 28-29) to the "• • • just and reasoned manner" test of **Gray v. Powell**, 314 U. S. 402, 411 (1941) and the "• • • warrant in the record and a reasonable basis in law" test of the **Hearst** case, *supra*, 322 U. S. at 131.

In **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474 (1951), this Court carefully analyzed the changes made in the review provision of the National Labor Relations Act, by the Taft-Hartley Act, 29 U. S. C. § 160(e). After questioning whether it had ever been permissible for a reviewing court to apply the substantial evidence test solely on the basis of evidence which might support the administrative order, **Universal Camera** makes clear that the Congressional change in the review provision firmly established the importance of the court's function, a function to be carried out on an evaluation of all the evidence in the record. 340 U. S. at 487-488, 490.

The Board ignores the critical change in this whole area of law, resting its argument, as we have stated above, on cases which dealt with an earlier and entirely different standard of review. The Board's view is further demonstrated by the fact that in its statement of the case, the Board adverts only to the testimony which it believes supports its determination. If this case involved no more than a consideration of the opinion below in the light of the standard fixed by Taft-Hartley, we submit that the judgment of the court below should be affirmed. The decision of that court was plainly based on a consideration of the record as a whole.

But this case involves an added consideration of crucial importance. Here, the decisive test, the basis for the ultimate decision whether United's agents are employees or independent contractors, is a legal test drawn from the law of agency. There can be no question but that, in this cir-

cumstance, the court below was fully empowered to apply that test to the facts of the record and was not under a duty of deference to supposed administrative expert knowledge on the resolution of this ultimate issue.

A. The Evaluation of the Record as a Whole.

In the second **Pittsburgh Steamship Company** case,²¹ this Court stated:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' **Federal Trade Comm'n v. American Tobacco Co.**, 274 U. S. 543, 544." (340 U. S. at 503).

Despite the contrary claim of the Board and the Union, it is clear that this case comes under the "usual rule" and does not present a question of principle " * * * the settle-

21. In **N. L. R. B. v. Pittsburgh Steamship Co.**, 340 U. S. 498 (1951), decided the same day as **Universal Camera Corp. v. N. L. R. B.**, 340 U. S. 474 (1951), this Court affirmed the Court of Appeals' denial of enforcement of the Board's order under the "whole record" test. In the earlier case, **N. L. R. B. v. Pittsburgh Steamship Co.**, 337 U. S. 656 (1949), this Court reversed and remanded the case for a consideration of the effect of the "scope of review" amendment to the Taft-Hartley Act which became effective subsequent to the Board's order but prior to the Court of Appeals' decision.

ment of which is of importance to the public * * *"; nor is there " * * * a real and embarrassing conflict of opinion * * *" between the circuits. 340 U. S. at 502. It is evident that the Court of Appeals' decision in the present case affects only the debit agents involved in this case. The controlling principle of law requires that each case raising the issue of employee-or independent contractor status under the Act be decided on its own facts. While the results attained in the decisions of the courts of appeals, treating of this issue, necessarily vary according to the facts of each case, the courts of appeals have uniformly applied the "right of control" test in distinguishing between employees and independent contractors under the Act.

That the Court of Appeals properly apprehended the standard governing its review of the record in this case is clear (A. 1237):

"Under the principles governing our review of the factual findings of the trial examiner, adopted by the Board, those findings are to be accepted if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474. But this formula for judicial review of the Board's administrative action was recognized in *Universal Camera* (340 U. S. p. 489) as affording '[s]ome scope for judicial discretion' and approved with the express realization that '[t]here are no talismanic words that can avoid the process of judgment', and the admonitions (340 U. S. pp. 488 and 496) that '[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight' and that the examiner's findings are not to be 'given more weight than in reason and in the light of judicial experience they deserve' and 'are to be considered along with the consistency and inherent probability of testimony'."

With this proper standard of review in mind, the Court of Appeals proceeded to examine the evidence on this record and determined that there was " * * * no support in the record for some of [the Board's] findings and but tenuous support for others. * * *" (A. 1239). The remaining factors relied upon by the Board were found to be entirely consistent with independent contractor status and were

" * * * not indicative of an existence or exercise of control directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors." (A. 1239).

In addition, the Court of Appeals found that the " * * * record * * * when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. There is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions." (A. 1243).

The Court of Appeals specifically addressed itself to principal factors relied upon by the Board. The Court of Appeals found a

" * * * lack of evidentiary support for the examiner's findings that the Company pays travel expenses and furnishes rent, postage and telephone. * * * There is no payment of the agents' actual travel expenses. The record does not establish that the Company furnishes

or reimburses the agent for postage. * * * With respect to 'rent', 'telephone' and the furnishing of 'office space' the record divulges only that during the three or four hours a week the agent spends in the district office of the Company, usually on the morning when he makes his weekly report and accounting, tables and chairs are made available in the district office which the agent may use while preparing his report. Likewise, the agent may occasionally use the Company telephone while he is in the district office or receive a telephoned message which has been left for him." (A. 1239).

The Board attached significance, for the purpose of differentiating between independent contractors and employees, to the matter of control over the transfer of policyholders from one agent to another and found that United controlled such transfers. Putting to one side any conflict of evidence on the point,²² the Court of Appeals viewed this factor as "not of critical significance". The court pointed out: "Both from the standpoint of the extent of the area in which an agent is to have responsibility for premium collections, and for the purpose of financial accounting with the agent, Company concern with such trans-

22. See p. 24, *supra*. There was ample testimony that transfers of existing policyholders were freely made between agents without prior company approval. To the contrary was the testimony of the witness Scott. Scott testified as to those instances in the period following the execution of the reinsurance agreement in which transfers were prevented by the company. He could remember no other such instances and admitted making and receiving many transfers in the following period. Scott maintained that a report form on transfers had to be executed and approved by United in advance of the transfer, a position contrary to that of a number of other agents who testified and in conflict with the physical facts. Here, again, the Trial Examiner preferred Scott's testimony to that of all the other witnesses who testified on the subject.

fers and its need for knowledge of the same is readily apparent." (A. 1240). The court's position is obviously sound. A company, whether it operates through independent contractors or employees, must keep itself informed as to the areas in which its representatives are active, which representatives are handling its business in those areas, and the state of its business in such areas. Here, at least in the collection phase of the business, the areas were defined not by geographical lines but by the debit. Without information of the coverage of each debit, United would have been without adequate knowledge of the functioning of its business. Thus, whether that knowledge came before or after transfer, the information, critical to the efficient management of the business, had nothing to do with the status of the agents.

Concerning the assistance or supervision allegedly given to the agents by United, the Court of Appeals found that the evidence demonstrated that the small amount of assistance which did exist was not such that it entailed control of the manner and means as distinguished from the results to be achieved by the agents. " * * * The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing and collection is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case." (A. 1240-1241). Similarly, the Court of Appeals concluded that the varying testimony concerning the agents' attendance at "sales meetings" was "equivocal" and that because of "[t]he continuity of the relationship involved and the mutual interest of the parties in the result to be obtained * * *", attendance of the agents at such sales meetings

was not a significant factor in determining whether or not they were independent contractors (A. 1240-1241).

With respect to other factors relied upon by the Board, the Court of Appeals noted that: “* * * These factors embrace most of those mentioned in our opinion in the earlier case involving the Company’s Pennsylvania debit agents (**United Insurance Company of America v. N. L. R. B.**, 7 Cir., 304 F. 2d 86). * * *” (A. 1238). Faced with the question of the status of United’s agents for the third time within the past few years, the court below, understandably, felt no obligation to set out again in detail each of the factors discussed in a prior Opinion. The detailed discussion by the Court of Appeals with respect to such factors in the earlier case is equally applicable to, and supported by, the facts in the instant record (304 F. 2d at 90):²³

“* * * A debit agent is ‘on his own.’ He sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments. * * * [T]he agent pays his own travel expense, rent, postage, telephone, bond expense and salaries of assistants; he may take holidays when he desires without notice to United. * * * An agent retains his own commission from collected premiums. As to selling insurance, the agent * * * is free to follow the superintendent’s suggestion or to devise his own methods.’

“[The Examiner] considered significant that each agent was assigned to the staff of a particular superintendent, and that certain reports are made by the agents.

“When United needs a new agent, he is given a debit within the territory of a particular office. To the

23. See pp. 23-24, *supra*.

extent permitted by insurance laws, an agent is free to choose any of these centers and usually selects one which is geographically convenient although other factors may be significant to him. But no agent may be transferred except at his own request, and he may sell and service policies anywhere in the state.

“* * * The reports mentioned by the examiner are no more significant than would be the situation where a manufacturer requires reports from its manufacturers' representative.

“The examiner relied upon the fact that rate manuals were owned by United. We think this is of no significance. Rate manuals in the insurance business are like a price list. A salesman must know the price of what he sells.”

The Board and the Union, however, point to still other factors which they say are supported by substantial evidence on this record and sustain the Board's determination. The Union stresses (Br., p. 57) that the agents “* * * are not engaged in a distinct calling or business of their own, apart from the Company, * * *” and asserts that this factor alone should be decisive. But many route distributors, driver-salesmen, and vendors, who are independent contractors, are engaged in the businesses of their principals, and are not, for that reason, employees of their principals. Where, as here, agents work when they want and where they want, pay all their own business expenses, bear the risk of loss, are free to engage in additional occupations including the sale of the policies of other companies, and are compensated solely by commissions, the fact that they are engaged in the same business as their principal would seem to be of little moment.

The Board and the Union emphasize that United's agents rely upon their work as debit agents for their means of livelihood. But countless other independent vendors and solicitors also rely upon the commissions which they earn in their principal's business for their livelihood. The agents retain their commissions on collections and remit only net collections to United. The amount of the agents' commissions is determined solely by their industry and ambition in selling new business and collecting premiums on old. United sets the rates at which its insurance policies are sold but only in the sense that such rates must be submitted to, and approved by, the appropriate state agency. In any event, independent distributors frequently have the price of the items they sell set by their principal.

Nor is it practical to argue that encouraging continuity of an independent contractor relationship converts it into an employer-employee relationship. Seasoned men are obviously preferable to novices, whether they are independent contractors or employees, and it is axiomatic that companies which use independent contractors, all try to retain their experienced and successful ones as a matter of good business practice.

The Board and the Union argue (Bd. Br. pp. 23-24; Un. Br., p. 57) that " * * * [t]he occupation of debit agent is usually done under the direction of an employer in a relationship viewed by the law as employer-employee * * *", and they cite decisions of various courts and studies of the insurance industry so indicating. What the Board and the Union refuse to acknowledge, however, is that an insurance company such as United may effectively determine to operate its business on an independent contractor basis. Certainly, one of the traditional and fundamental rights of management is to decide for itself whether to perform its

functions through employees or independent contractors. Long ago, United made a conscious choice to conduct its business through independent contractors; this choice should not now be disturbed. As the court below put it in its earlier opinion (304 F. 2d 90-91):

“* * * [S]ome insurance companies have established an employer-employee relationship such as the company in *N. L. R. B. v. Phoenix Mutual Life Insurance Company*, supra. [167 F. 2d 983 (C. A. 7, 1948)].

“In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do.”

Furthermore, while the Board and the Union cite (*Bd. Br.*, p. 24; *Un. Br.*, p. 58) various state court decisions holding that debit agents are, for one purpose or another, employees, they fail to mention the many other cases contained in the same annotation which hold debit agents to be independent contractors. See “Liability of Insurance Company for Negligent Operation of Automobile by Insurance Agent or Broker”, 36 A. L. R. 2d 261-285 (1954). Similarly the Board and the Union cite *Capital Life and Health Insurance Company v. Bowers*, 186 F. 2d 943 (C. A. 4, 1951) without making any reference to *Zipser v. Ewing*, 197 F. 2d 728 (C. A. 2, 1952).²⁴ A reading of these Social Security Act cases demonstrates that *Zipser* is much closer factually to the present case than is *Bowers*. In *Zipser*, the Court of Appeals stated (197 F. 2d at 731):

“* * * Insurance agents like *Zipser* are ‘competent salesmen, almost entirely dependent upon their own

24. See also, *Sterns v. Clauson*, 122 F. Supp. 795 (D. Maine, S. D., 1954).

initiative, skill, and personality for success, working upon their own time, at their own expense, and deriving their remuneration from the results of their work.' As such they are not 'employees.' *Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan*, 8 Cir., 179 F. 2d 882, certiorari denied 340 U. S. 823, 71 S. Ct. 57, 95 L. Ed. 605, cf. *United States v. Kane*, 8 Cir., 171 F. 2d 54. The company did not, and under the agreement, could not have required the agent to work full time for it, canvass any particular territory, or, with any particular frequency, contact any particular prospect, use any particular sales technique, require regular reports, confine himself to selling a particular amount or kind of policy. Zipser did not even have a minimum quota to sell during the year. See *Brady v. Periodical Publishers' Service Bureau*, 6 Cir., 173 F. 2d 776; *Benson v. Social Security Board*, 10 Cir., 172 F. 2d 682; *Party Cab Co. v. United States*, 7 Cir., 172 F. 2d 87, 10 A. L. R. 2d 358; *Broderick, Inc. v. Squire*, 9 Cir., 103 F. 2d 980; *McGowan v. Lazeroff*, 2 Cir., 148 F. 2d 512. See also the state cases holding insurance agents to be independent contractors, not employees, *e.g.*, *Northwestern Mutual Life Ins. Co. v. Tone*, 125 Conn. 183, 4 A. 2d 640, 121 A. L. R. 993."

The Board and the Union make the curious argument that United's agents are employees because their work requires little or no skill (Bd. Br., p. 21; Un. Br., pp. 22-24). The weight to be accorded the degree of skill involved in passing on the question of independent contractor versus employee status is doubtful. It is a matter of common knowledge that some employees are highly skilled and some areas of independent activity require little or no skill. In any event, it is inaccurate to characterize United's agents as functioning in an area which requires no skill. They sell

various types of insurance and must be licensed by the state as to each type. They must be familiar with all aspects of different policies and be possessed of the knowledge necessary to advise potential customers. A new agent may require advice but his success will depend on the amount of skill he develops in sales techniques and in knowledge of his materials.

Contrary to the contention of the Board and the Union (Bd. Br., p. 21; Un. Br., pp. 62-63), United does not furnish its agents with the instrumentalities, tools, and place of their work. The agents do not work on United's premises. They spend no more than three or four hours a week in a district office (A. 1239). Their "place of work" is the home or wherever else they may choose, and the area in which they carry on their business. This area is not geographically restricted by United. The agents are free to solicit and obtain business anywhere subject only to various state insurance laws. The agents come and go as they please, and they may, at their own expense, hire any assistants they please. In no sense can United be said to restrict their business activities or to furnish the tools and place of their work. Moreover, in the last analysis, the tools of an agent are his own " * * * initiative and personality * * *." 304 F. 2d at 90.

The assistance which United furnishes the agents from time to time, in no way limits the freedom of the agents in the conduct of their business. The agent's reports of results are checked for accuracy; the agent's debit is serviced by an assistant manager, if available, when the agent is absent because of illness or for any other reason; and the agent's attendance at meetings for informal sales discussions is at his option and no action is taken if the agent chooses not to attend, although the benefit of the meetings is such that agents come if they can. The agents report

only the results of their efforts, not the days or hours worked or calls made, and even these reports of results are made only once per week. When an agent is experiencing a period of poor production, suggestions will be made as to how he may improve his production and earnings. But the agent is free to accept or reject any such suggestion. In short, United's agents are not supervised in the conduct of their business. They are only required to produce reasonable results and honestly report them. The methods used in obtaining those results are for the agent's ultimate determination.

The Union also points to the fact that United may terminate an agent when a review of the agent's reports reveals a serious shortage, some "wrongdoing", or an unusually poor production record for an extended period of time (Br., pp. 29-35). Under the "Agent's Commission Plan", the contract is terminable at will by either United or the agent. The Plan provides "that within ninety (90) days after termination, the Company will conduct an audit of [the] agency and settlement on such audit shall then promptly be made" (A. 1058). United's occasional exercise of this contractual right scarcely proves that United therefore possesses the right to control the manner and means by which the agents sell and service its policies.

The Union asserts (Br., p. 19) that the agents are employees because they do not possess title to United's policies and are not free to "alter, or discharge contracts, waive forfeitures, quote rates other than those published by the Company, [or] allow rebates* * *". Surely, to argue that these facts demonstrate employee status is to strain credulity. The simple fact of the matter is that the insurance industry is a highly regulated form of business. No insurance agent, not even the large independent insurance agency, possesses all the rights, which the Union

would have a United agent possess in order for him to be considered an independent contractor.

To summarize then, the Court below, in passing on the question of status of United's agents, examined all the facts of record, found that these facts supported United's position and that the arguments in favor of the Board's conclusion were "tenuous" at best. The care with which the Court below examined the record and reached the same conclusion on two occasions can be illustrated by comparing the outcome here with the result reached by the Court below in **N. L. R. B. v. Phoenix Mutual Life Ins. Co.**, 167 F. 2d 983 (C. A. 7, 1948), *cert. denied*, 335 U. S. 845 (1948). In **Phoenix**, the Court below held that the debit agents were, in fact, employees. To illustrate graphically the contrast between the facts here and in **Phoenix**, a chart has been prepared and is attached to this brief as Appendix A. The same chart also contrasts the facts here and those presented by the **Hearst** case. We submit that a reading of this comparative chart demonstrates the care with which the Court below examined the record, and the correctness of its decision.

Moreover, the Court of Appeals concluded that " * * * in addition to the infirmity of some of the critical findings from the standpoint of lack of substantial evidentiary support, and the insignificant or equivocal nature of the factors embraced in other findings * * * ", it was " * * * confronted with a record which, when viewed in the light consideration in its entirety furnishes, is revealed to be tainted with a flavor which precludes us from conscientiously relying upon it as adequately supporting the Board's determination and order. * * * " (A. 1243). The Trial Examiner's findings were based upon " * * * a credibility resolution that the General Counsel's chief witness, Ronney E. Scott, a former employee—debit agent of Quaker and the chairman of

the Union's local, whose display of evident 'partisanship' was recognized, 'was a reliable witness' * * * (A. 1241). Further, the Examiner's appraisal of the testimony and his resulting findings were accompanied by and made in the context of his observation of alleged off-the-stand demeanor of other United agents (A. 1151-1152):

"* * * [W]ithout-exception the agents did not display or appear to have attributes of independence * * *, but acted and appeared to be regarded as rank-and-file employees, not of high rank either in fact or in regard. * * *

"* * * I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties."

The Court of Appeals determined (A. 1243) that " * * * resort to conclusions drawn from the application of such an elusive subjective standard as the examiner here puts forth is improper and that conclusions so drawn do not afford an acceptable basis for a credibility appraisal much less can they supply any independent evidentiary content. *Kovacs v. Szentes*, 130 Conn. 229, 33 A. 2d 124 [1943]."

To the Board's claim that any prejudice worked by the Examiner's resort to such off-the-stand demeanor was eradicated by the Board's subsequent disavowal of reliance thereon in affirming and adopting the Trial Examiner's findings, the Court of Appeals responded that it could " * * * not perceive how this disavowal [could] serve to remove from the examiner's findings and conclusions the

flavor with which his demeanor observation tainted them. *Cf. Wheeler v. N. L. R. B.*, D. C. Cir., 314 F. 2d 260, 263 [1963]; *N. L. R. B. v. American Federation of Television and Radio Artists*, 6 Cir., 285 F. 2d 902, 903 [1961] * * * (A. 1243). The Court of Appeals added that its study of the record left it “* * * with a distinct impression that the flavor of the demeanor observation and accompanying rationalization not only pervades the examiner’s credibility resolutions, and thus taints the findings and conclusions resulting from the testimony so credited, but also that independent evidentiary content and force may well have been given, albeit undesignedly, to the ‘employee attitude’ the examiner so tenuously surmised was reflected by debit agents’ off-the-stand demeanor” (A. 1243).

While a Trial Examiner’s credibility findings, arrived at in proper fashion, are ordinarily not subject to review by the Board or a court of appeals,²⁵ credibility findings based upon such elusive manifestations of human reactions as “obsequiousness” and “courtesy”, to which the examiner applies his own view of what attitudes are “characteristic” of relationships between employers and employes and between independent contracting parties, are surely open to judicial scrutiny. Especially should this be true where, as here, such credibility findings not only pervade the examiner’s findings of fact, but are also given independent force and meaning.

In *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. at 488-490, this Court stated that:

“* * * The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

* * *

25. *N. L. R. B. v. Pittsburgh Steamship Co.*, 337 U. S. 656 (1949); *N. L. R. B. v. Walton Mfg. Co.*, 369 U. S. 404 (1962).

“* * * [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

“* * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.”

We submit that the Court of Appeals properly apprehended and applied these standards in its review of this record. Courts of Appeals in other Circuits have held, under circumstances comparable to those presented here, that the uncorroborated testimony of an interested witness—in this instance Scott the Union leader dedicated to proving employee rather than independent contractor status—is not always conclusive on the court.²⁶ Here, the Union admits (Brief, p. 41) that “* * * this particular record makes clear that the Quaker City agents, who had acted together as a Union before [United] took over, have continued to do so * * * [with] [a]gent Scott * * * as the collective spokesman * * *”. Scott's motives were plain. Yet, despite the contradictory testimony of ten other agent witnesses, every aspect of Scott's testimony was blindly

26. See, e.g., *N. L. R. B. v. Barberton Plastics Products Inc.*, 354 F. 2d 66, 69 (C. A. 6, 1965); *N. L. R. B. v. Mt. Vernon Telephone Corp.*, 352 F. 2d 977, 979 (C. A. 6, 1965); *Portable Electric Tools, Inc. v. N. L. R. B.*, 309 F. 2d 423, 426 (C. A. 7, 1962); *Farmers Co-operative Co. v. N. L. R. B.*, 208 F. 2d 296, 303 (C. A. 8, 1953); *Victor Products Corp. v. N. L. R. B.*, 208 F. 2d 834, 839 (C. A. D. C., 1953).

credited. " * * * [Where] an administrative agency ignores all the evidence given by one side in a controversy and with studied design gives credence to the testimony of the other side, the findings would be arbitrary and not in accord with the legal requirement." **N. L. R. B. v. A. Sartorius & Co.**, 140 F. 2d 203, 205 (C. A. 2, 1944).

Here, the overall testimony of the witnesses—the solid sense of the record—failed to support the Examiner's preconceived findings. "The * * * findings of the examiner are to be considered along with the consistency and inherent probability of testimony. * * *" **Universal Camera Corp. v. N. L. R. B.**, *supra*, at 496. In addition, the Examiner's credibility resolutions were reached upon a highly suspect basis and made the backbone of an otherwise unfounded decision. The Trial Examiner's intuitive "hunch" that United's debit agents were employees because of their seeming "obsequiousness" and "courtesy" in their off-the-stand demeanor in the courtroom was no substitute for probative evidence. Such a "hunch" may " * * * mask the sheer determination to find in a certain way, and thus substitute the will of a man for the 'reason' of the law. * * *" ²⁷ The Board's decision in this case was simply not " * * * justified by a fair estimate of the worth of the testimony of witnesses * * *". 340 U. S. at 490.

B. The Power to Draw the Ultimate Conclusion.

As we pointed out earlier in this brief, *supra*, pp. 34-36, the Board and the Union strenuously urge that a Board determination of employee status should not be disturbed on review, if it has "warrant in the record" and a "reasonable basis in law", because such a determination falls within the Board's sphere of expertise. We submit that the conclusion of employee or independent contractor status

²⁷ Jaffe, Louis L., *Judicial Control of Administrative Action* (1965), p. 607.

under the Act can only be reached upon application of general agency principles, as Congress specifically directed, and that the application of these principles is not within the Board's expertise but, *per contra*, within the Court's.

We fully recognize the Board's general expertise in the field of labor relations. But if that expertise is to limit judicial review of the Board's conclusion in a particular case, it is respectfully suggested that the expertise must be relevant to the solution of the question at hand. In cases such as **Republic Aviation Corp. v. N. L. R. B.**, 324 U. S. 793 (1945) and **N. L. R. B. v. Seven-Up Bottling Co.**, 344 U. S. 344 (1953), the Board's expertise was properly invoked because of the overriding importance of labor relations policy considerations in those decisions and the absence of any limiting Congressional mandate. However, in a case like this one, where Congress has emphatically directed the Board to apply "the general principles of the law of agency", there is no occasion for deferring to the Board. The courts here possess the expert knowledge and ability, not the Board.

As Professor Jaffe put it²⁸—" * * * Congress may itself quite clearly exclude the exercise of agency discretion with respect to all questions or with respect only to certain questions. Thus Congress' immediate response to *Hearst* was to enact an amendment to the Wagner Act that 'employee' would no longer cover those having the status of an 'independent contractor.' This speaks only in substantive terms; but since the reference is to a common-law concept, it would seem also to point to the judge as the one to make the decision."

The Board and the Union contend that, although Congress' amendment of the Act nullified this Court's substantive holding in *Hearst*, the "warrant in the record—reason-

28: Jaffe, *op. cit. supra*, p. 562.

able basis in law" standard for review enunciated in that case was not altered and remains the standard of review to be applied in cases of this type. As already noted, *supra*, p. 35, this argument completely ignores the general change in the scope of review of Board orders brought about by the Taft-Hartley amendment of Section 10(e) of the Act. Putting this to one side, the view also overlooks the Congressional substitution of agency principles for Board discretion in this area, a change which necessarily resulted in a significant change in the appropriate standard of review.

When an administrative agency uses common law concepts in arriving at its determination, the correctness of the agency's interpretation and application of those principles is ultimately for the courts to decide. This Court has always accorded to the courts of appeals greater freedom of review in such cases and has itself felt free to review such administrative determinations. Thus, in **S.E.C. v. Chenery Corp.**, 318 U.S. 80 (1943), the Securities and Exchange Commission had held that the managers of a corporate reorganization, who had bought shares of the corporation *pendente lite* in order to assure their participation in the reorganized corporation, had thereby breached the established common law obligations of fiduciaries. On appeal from the S.E.C.'s disapproval of the reorganization plan, this Court, asserting its prime competence to develop and to declare the common law, remanded the case to the S.E.C. for further consideration, on the ground that it could find no breach of fiduciary obligations under existing judicial precedent.

Several years later, in the case of **Texas Gas Transmission Corp. v. Shell Oil Co.**, 363 U.S. 263 (1960), wherein the Federal Power Commission had reached its determination upon an application of ordinary rules of contract construction, this Court stated (at p. 270):

“* * * since the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles. See *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 91.”²⁹

Two court of appeals' decisions illustrative of this principle are *S.E.C. v. Cogan*, 201 F.2d 78 (C.A. 9, 1952), and *In Re Engineers Public Service Co.*, 221 F.2d 708 (C.A. 3, 1955). Both of these cases involved the question whether attorneys were properly denied counsel fees by the S.E.C. on the ground that they had not adhered to the requisite standard of fiduciary conduct. In *Cogan*, the Ninth Circuit at first affirmed the S.E.C.'s denial of fees, but on rehearing reversed the Commission, stating (201 F.2d at 86):

“* * * The able and learned district judge was, we think, as well qualified to pass upon what are the proper standards of professional conduct, and to arrive at appropriate conclusions as to Cogan's act, as

29. In the *Texas Gas* case, the petitioners unsuccessfully advanced the identical argument as to the scope of judicial review which is here urged by the Board and the Union. There, it was urged that the Court of Appeals had “* * * exceeded the allowable limits of judicial review * * *” on the theory that the Court was bound by the “* * * expert knowledge and judgment * * *” of the Federal Power Commission on the issue involved. 363 U. S. at 268. Petitioners urged that the court was bound to accept the Commission's view if that view had “* * * warrant in the record and a reasonable basis in law * * *”. *Id.* This Court pointed out that the question before both the Commission and the Court involved the application of rules of contract construction, not the use of any specialized knowledge or experience on the part of the Commission, and that there was no warrant for imposing the restrictive rule as to the scope of review urged by petitioners. 363 at 268-269, 270.

was the Commission. If any 'expertise' was involved, it belonged to the district judge because of his familiarity with the ancient standards of proper fiduciary conduct as long established in the courts of equity.

* * * And so, just as in the first *Chenery* case the Supreme Court because of its superior knowledge of the principles established by courts of equity, rejected what the commission said of those principles, so here we think it manifest that the district judge knew more about the subject in hand than did the Commission.
* * *

In *In Re Engineers*, Chief Judge Biggs reiterated what was said in *Chenery* and *Cogan* (221 F.2d at 712):

"* * * The issue does not require the type of judgment which administrative agencies are best equipped to make. We are of the opinion that the District Court here was as well qualified as the Commission—if not better qualified—to determine whether the appellees should be compensated for their services, so that no particular deference is due the administrative judgment. See Davis, *Administrative Law* 927.
* * * We, therefore, shall review the standards applied by the Commission in this case without that exacting deference that is due to the determination of experts."

The Court thereupon reversed the Commission.³⁰

An examination of the cases in which the several courts of appeals have considered the substantive issue presented here, i.e., employe versus independent contractor status, under the Act, discloses that they have exercised a high degree of independent judgment in passing upon the correctness of the Board's ultimate conclusion. The courts of

30. See also, *James S. Rivers, Inc. (WJAZ) v. Federal Communications Commission*, 351 F. 2d 194, 198 (C.A. D. C. 1965) (Bazelon, C. J., concurring).

appeals have consistently, and quite aside from the Board's determination, closely scrutinized the records before them and, upon their own analysis of the facts, arrived at their own conclusions as to whether the status of the persons involved was that of employe or of independent contractor. Thus, the decisions of the courts of appeals in this area more often than not speak in terms of "we feel", "we think", "in our opinion", "in our view", etc.³¹—unmistakable hallmarks of the exercise of independent judgment. The courts of appeals constantly refer to the legislative history of the 1947 amendments and the directive that common law concepts be applied, and speak of "the critical question before us", and state that the "court * * * must determine [the] issue".³² Manifestly, the Courts of Appeals keep a tighter rein on the Board in these cases than in others. United submits that this is entirely appropriate and wholly in keeping with the legislative history of the independent contractor exception.

The Board argues (Bd. Br. p. 19), as does the Union in the same vein, that " * * * problems of definition of status * * * are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole' * * *", **Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko**, 373 U.S. 701, 706 (1963), and

31. See, e.g., **Frito-Lay, Inc. v. N. L. R. B.**, 66 LRRM 2542 (C. A. 7, 1967); **Site Oil Co. of Missouri v. N. L. R. B.**, 319 F. 2d 86 (C. A. 8, 1963); **N. L. R. B. v. Servette, Inc.**, 313 F. 2d 67 (C. A. 9, 1962).

32. See, e.g., **National Van Lines, Inc. v. N. L. R. B.**, 273 F. 2d 402 (C. A. 7, 1960); **N. L. R. B. v. Phoenix Mutual Life Ins. Co.**, 167 F. 2d 983 (C. A. 7, 1948); *cert. denied*, 335 U. S. 845; **Minnesota Milk Co. v. N. L. R. B.**, 314 F. 2d 761 (C. A. 8, 1963); **N. L. R. B. v. Keystone Floors, Inc.**, 306 F. 2d 560 (C. A. 3, 1962); **N. L. R. B. v. Norma Mining Corp.**, 206 F. 2d 38 (C. A. 4, 1953); **N. L. R. B. v. Steinberg**, 182 F. 2d 850 (C. A. 5, 1950).

refers this Court to cases interpreting the term "supervisor" as it is contained in Section 2(11) of the Act.³³ These cases are readily distinguishable from the present case on two grounds: (1) the term "supervisor" is not a common law term, and (2) Congress has not ordained that the term "supervisor" be interpreted by reference to any particular body of concepts. The term "supervisor" is, in this respect, more like the term "crew" as contained in the Longshoremen's and Harbor Workers Compensation Act³⁴ and defined by this Court: "The word 'crew' does not have an absolutely unvarying legal significance. * * * It must be defined 'in the light of the mischief to be corrected'". **South Chicago Coal & Dock Co. v. Bassett**, 309 U.S. 251, 258-259 (1940).³⁵ Conversely, the terms "employee" and "independent contractor", as used in the Labor Act, are to be defined not so much "in the light of the mischief to be corrected" as in accordance with common law principles of agency law.³⁶

33. **Journeyman Plasterers' Protective and Benevolent Society of Chicago v. N. L. R. B.**, 341 F. 2d 539, 545 (C. A. 7, 1965); **N. L. R. B. v. Swift and Company**, 292 F. 2d 561, 563-564 (C. A. 1, 1961).

34. 33 U. S. C. §§ 901-950.

35. See also, **N. L. R. B. v. Coca Cola Bottling Co.**, 350 U. S. 264 (1955) and **N. L. R. B. v. Highland Park Manufacturing Co.**, 341 U. S. 322 (1951), in which this Court construed the statutory terms "officers" and "labor organization" in accordance with the ordinary layman's understanding of those terms—"the speech of people"—since the legislative history of the Act provided no guide for definition. Here, of course, the legislative history of the Act indicates that the terms "employee" and "independent contractor" are to be interpreted in accordance with "the general principles of the law of agency".

36. This Court's decision in **Office Employees International Union, Local No. 11, AFL-CIO v. N. L. R. B.**, 353 U. S. 313 (1957), should also be noted. There, the Board had refused to assert jurisdiction over labor unions as a class, when acting as "employers", despite Congress' clear intent to the contrary. This Court, citing the legislative history, held that " * * * the Board erred when it refused to take jurisdiction and thus, in effect,

As noted *supra*, at p. 18, the term "employee" is also to be defined by reference to common law concepts under the Social Security Act. In reviewing determinations of employee status under that Act, the courts of appeals have likewise, when the occasion warranted, exercised independent judgment and not abdicated to the administrator's determination. See, *e.g.*, **Salki v. United States**, 306 F.2d 642 (C.A. 8, 1962); **Cody v. Ribicoff**, 289 F.2d 394 (C.A. 8, 1961); **Benson v. Social Security Board**, 172 F.2d 682 (C.A. 10, 1949); **Ewing v. Vaughan**, 169 F.2d 837 (C.A. 4, 1948); **Carroll v. Social Security Board**, 128 F.2d 876 (C.A. 7, 1942). But see **Delno v. Celebrezze**, 347 F.2d 159 (C.A. 9, 1965):

In short, while the Board may have expertise in interpreting particular statutory terms, Congress has made clear its intention that the terms "employee" and "independent contractor" are to be interpreted "under the general principles of the law of agency"—a task for which the Board possesses no special competence. Experienced in the resolution of common law questions, the court below correctly, and in complete accord with the decisions of the

engrafted a blanket exemption upon the Act for all labor unions as employers. * * * 353 U. S. at 315. Here, the Board's assertion of jurisdiction over debit agents, as a class, despite Congress' contrary intention that the Act's coverage extends only to "employees" as distinguished from "independent contractors" under common law standards, should be rejected as an attempt by the Board to engraft upon the Act blanket coverage over debit and similar insurance agents. The Board's obstinate adherence to its view as to blanket coverage of debit agents is perfectly illustrated by the history of its treatment of *United*. We have already adverted to the fact that the court below has been twice called upon to rule on this status issue. See page 4, *supra*. The first and earliest case before that court which involved *United's* debit agents raised a revealing issue of due process, namely the refusal of the Board to permit *United* to adduce any testimony as to the nature of its operation which bore on the question of the status of its agents. 272 F. 2d 446 (C. A. 7, 1959).

Court, brought its knowledge and insight to bear upon its examination and evaluation of the evidence on this record. The significance and relevance of the various factors cited by the Board were carefully appraised in the light of the appropriate legal standards. The Court of Appeals thereupon determined that, cast in this light, some of these factors were "not of critical significance", while others were "equivocal", or "consistent with an independent contractor status". Since the characterization of facts as significant or insignificant, relevant or irrelevant, is not the finding of facts, but rather the application of legal standards to facts already found, these determinations were plainly made within the Court of Appeals' proper scope of review.

III.

THE BOARD ERRED IN ORDERING UNITED TO BARGAIN WITH A UNION PURPORTING TO REPRESENT A UNIT WHICH, AT THE WORST, WAS HALF EMPLOYEE AND HALF INDEPENDENT CONTRACTOR.

At the time of the events testified to in this case, the Board's witness Scott, a former Quaker agent, reported to United's Franklin Street office in Baltimore, a former Quaker location, which had been taken over by United in March, 1964 when its reinsurance agreement with Quaker became effective (A. 200, 354).³⁷ The ten agents who testified on behalf of United in this case, and who had sold and serviced United's policies in Baltimore prior to the United-Quaker reinsurance agreement, reported to United's St. Paul Street office in Baltimore which had long been, and still is, a United district office (A. 694, 755, 831, 875). Scott's knowledge of the manner in which United conducts its business was therefore plainly restricted to the Frank-

37. This former Quaker office was discontinued as a reporting center by United in September, 1965.

lin Street office; he did not even pretend to have any knowledge of the manner in which United conducts its business in any other district in Baltimore City or Anne Arundel County, Maryland.

Thus, even if the Board could have concluded, on the basis of Scott's testimony, that control was exercised over the former Quaker agents, all of whom reported to the Franklin Street, Baltimore office, the uncontradicted testimony of the ten United agents, who reported to the St. Paul Street, Baltimore location, required the Board to find that the agents who reported to the latter office were truly independent contractors.

The Trial Examiner, who relied entirely on Franklin Street testimony, was plainly wrong in his assumption that an exercise of control at one location demonstrated a right of control at every other location. Moreover, in finding that United exercised control over the former Quaker agents, the Examiner completely discounted the turmoil which existed in United's Baltimore district offices during the months following the United-Quaker reinsurance agreement. The Examiner stated, without witness or authority, that the transitional period lasted through the month of March, 1964 (A. 1158). Since the reinsurance agreement became effective March 16, 1964, this meant that, in the Examiner's opinion, the transitional period consumed only two weeks. Yet, Scott, in his testimony, plainly conceded that the changeover was still going on as late as September, 1964 (Ex. GC 38; A. 1104-1106). It will be remembered that the hearings in this case were held in December, 1964.

William Formwalt, a former Quaker agent and district manager, and thereafter a United district manager and division manager, testified that the objective of United was to put the former Quaker agents "on their own" (A. 498), but that these agents "resented or resisted the change, and

• • • wanted to stay status quo" (A. 503), i.e., they wanted to remain employes, as they had been as Quaker agents. To this end, Scott, as a former Quaker agent and chairman of the Union local, attempted to create as many indicia of employe status as possible in the relationship between United and the former Quaker agents. To whatever extent Scott succeeded in this endeavor, he, as the spokesman for the former Quaker agents, frustrated United's clear objective to operate its business on a uniform independent contractor basis.

Clearly, however, Scott's activities were limited to the Franklin Street, Baltimore office. The ten old line United agents who reported to the St. Paul Street, Baltimore office testified, without contradiction, that they operated "on their own", wherever, whenever and however they pleased. Their testimony was no different than was the testimony adduced from United's Pennsylvania debit agents in the earlier case (304 F. 2d 86). Accordingly, even if the Board could have concluded that the former Quaker agents remained employes after becoming United agents, and despite their signing of independent agency agreements, this record required the Board to find that the remaining agents involved in this case were independent contractors. In this circumstance, the Board was without power to order United to bargain with respect to its agents at the St. Paul Street office, approximately one-half of the total involved, who, according to all of the testimony in the record, are clearly independent contractors.³⁸ There is no contrary testimony. Under the Labor Act, no employer can be compelled to bargain with respect to a unit which includes independent contractors, let alone one which, at worst, is half employe and half independent contractor.

38. As noted, p. 5, *supra*, one hundred fifty-nine agents were ruled eligible to vote in the certification election held in August, 1964. Eighty of these agents were old line United agents; seventy-nine of these agents were former Quaker agents (A. 339).

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

BERNARD G. SEGAL,

SAMUEL D. SLADE, .

HERBERT G. KEENE, JR.,

*Attorneys for United Insurance
Company of America.*

Dated: December 27, 1967.

APPENDIX A.

Factual Analysis and Comparison of United's Independent Agency System With Systems Used in N. L. R. B. v. Phoenix Mutual Life Insurance Co., 167 F. 2d 983 (C. A. 7, 1948), Cert. Denied 335 U. S. 845, and N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111 (1944).

Factor

United

1. Furnishing of facilities and services.

United's agents are not permitted to use the district offices for the general conduct of their business; United does not provide its agents with "rent", "telephone", "office space", postage, or business cards; United's agents pay all their own business expenses; United furnishes its agents only business forms and some advertising materials.

2. Control over the details of the agents' operations.

United's agents are "on their own", free to conduct their business whenever, wherever and however they desire.

Phoenix

Phoenix provided its agents with a headquarters and furnished its agents with office space, desks, telephones, stenographic service, stationery, postage, filing cabinets, sales supplies, business cards, advertising specialties and other materials.

Phoenix kept close check on the details of its salesmen's work and exercised a large measure of control over them.

Hearst

Hearst furnished its newsboys with boxes, racks, money change aprons and placards advertising special features contained in the papers; the equipment was distributed without charge to the newsboys but with instructions as to its use.

The newsboys were required to be at their posts from the time the papers customarily appeared on the street to the time settlement was made; the diligence of the newsboys was closely observed by the circulation department; the district managers instructed the newsboys how to hold, display and call the newspapers; Hearst exercised supervision over the conduct of the

*Factor**United*

3. Assigned territories.

The debits serviced by United's agents frequently overlap; the agents are free to solicit and obtain new business anywhere, subject only to the various states' insurance laws; the agents are free to transfer policies among themselves, but may not assign their contracts.

4. Full-time job.

United's agents are free to engage in additional occupations including the sale of competing companies' policies.

5. Hiring of assistants.

United's agents are free to hire assistants, if they wish, to aid them in the servicing of their debit.

6. Risk of loss.

United's agents bear all risk of loss including "hold-up" shortages and unpaid premiums on lapsed policies.

Phoenix

Hearst

newsboys while they were engaged in selling newspapers on the street.

Territories were assigned to the agents; policies could not be transferred between the agents without company approval, and contracts could not be assigned.

The district manager allocated the street corners in his district and removed, permanently or temporarily, newsboys from their corners or transferred them from one location to another; on occasion, the newboys bought and sold corners without the publisher's knowledge or express approval.

Phoenix required its agents to devote full time to its business and its agents were not permitted to sell competing companies' policies.

The newsboys sold several newspapers and handled magazines although in some instances the publishers objected to their handling competing publications.

Phoenix did not permit its agents to hire anyone to assist them in their work.

Many of the newsboys hired others at will to help them sell newspapers in their assigned locations.

Phoenix paid for its agents' indemnity bonds.

The newsboys were required to account for all papers not returned and not sold; the burden of loss without fault fell upon the newsboys.

*Factor**United*

7. Compensation.

United's debit agents work strictly on a commission basis with no salary, advance or draw; the rates for its policies are set by United but must be submitted to and approved by the state insurance department; thereafter, the rates cannot be changed without state approval.

8. Reports.

United's agents file only weekly reports of the results of their operations i.e., collections made and policies sold; at no time do they in any manner report the hours worked or the interviews held.

9. Performance.

United's agents are required only to produce reasonable results.

Phoenix

During the first two years of their service, Phoenix's agents could operate under a financing contract, which included advance draws, rather than a regular commission contract, the rates for Phoenix' policies were similarly set and approved.

Phoenix's salesmen were required to furnish management with daily records of daily interviews and sales, the number of hours worked in the field, the number of interviews had, and the number of new prospects interviewed for each day of the week.

Phoenix required its agents to produce a specified minimum of new business each year.

Hearst

The newsboys' compensation was the difference between the wholesale and retail prices of the papers; both these prices were fixed by the publishers.

Daily settlements were held.

The district managers determined the number of papers in excess of the newsboys' established orders which they had to sell; the newsboys could not determine the size of their established orders without the cooperation of the district managers.

*Factor**United*

10. Establishment and permanency of relationship.

United's agents are engaged, under written contract, following application and interview; no experience is necessary; little or no training is offered the agents; the agents are encouraged to continue their relationship with United as seasoned men are obviously better than novices; United does not pay unemployment compensation or provide workmen's compensation but does permit agents to participate in group insurance and pension plans, to which United and the agent contribute equally, on a strictly voluntary basis, and makes Social Security Act payments on behalf of the agents in accordance with Section 3121(d)(3)(b) of that Act.

Phoenix

Phoenix selected its agents upon written application and after personal interview; its agents executed an agency contract; no experience was required; Phoenix conducted an intensive training program for its agents; only after completing the training period were the agents permitted to take field trips; during their first interviews they were usually accompanied by a supervisor; Phoenix encouraged its agents to remain permanently with it; Phoenix provided its agents with a non-contributory pension plan and also made available a disability plan.

Hearst

Hearst did not provide its newsboys with workmen's compensation coverage or make payments under the Social Security Act on their behalf. Other items mentioned under this heading, in the cases of United and Phoenix, do not appear in the case of Hearst.

DEC 26 1967

SUPREME COURT, U. S.

In the
Supreme Court of the United States

OCTOBER TERM, 1967.

No. 178

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

UNITED INSURANCE COMPANY OF AMERICA,
et al.,
Respondents.

No. 179

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

**MOTION OF AMERICAN RETAIL FEDERATION TO
FILE A BRIEF AMICUS CURIAE IN SUPPORT OF
THE POSITION OF APPELLEE**

AND

**BRIEF AMICUS CURIAE ON BEHALF OF THE
AMERICAN RETAIL FEDERATION**

PHILIP C. LEDERER
SHAYLE P. FOX
LAWRENCE M. COHEN
33 South Clark Street
Chicago, Illinois 60603

LEDERER, BARNHILL AND FOX
33 South Clark Street
Chicago, Illinois 60603
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967.

No. 178

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

UNITED INSURANCE COMPANY OF AMERICA,
et al.,
Respondents.

No. 179

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

**MOTION OF AMERICAN RETAIL FEDERATION TO
FILE A BRIEF AMICUS CURIAE IN SUPPORT OF
THE POSITION OF APPELLEE**

Comes now the American Retail Federation (herein-
after called the "Federation") by its attorneys, Philip
C. Lederer, Shayle P. Fox and Lawrence M. Cohen, and

respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae*, supporting the position of Appellee and urging affirmance of the decision of the United States Court of Appeals for the Seventh Circuit herein, in these cases for the following reasons:

1. The Federation is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. The Federation's interest is based on the potential broad and far-reaching effect, attributed to the instant cases by Appellants in their petitions for *certiorari* herein, on these retail establishments, which threatens to disrupt settled patterns of marketing, distribution and independent contractor relationships in the retail field.
2. The experience of the retail establishments, whose interest the Federation seeks to represent herein, in interpreting the terms "employee" and "independent contractor" under Section 2(3) of the National Labor Relations Act and other statutes has been wide-spread and considerable and such experience includes numerous litigated matters with respect to this issue before the National Labor Relations Board, other federal and state agencies and the courts.
3. While the Federation has confidence in the ability of counsel for the Appellee to argue fully

and fairly the implications of the issues involved in the instant proceeding, especially as they relate to the particular dispute between a single employer and a union which is before the Court, the Federation believes that its unique experience may be useful to the Court in exploring the dimensions of the issues raised by these cases. In its *amicus* brief, if permission to file such a brief is granted, the Federation will delineate the potential effect of the Appellants' position, on the various means of marketing and distribution and the manifold types of independent contractor relationships which are utilized in the retail industry today.

4. Counsel for all parties have been requested to consent to the Federation's filing a brief as *amicus curiae*, and the Applicant has been advised by Counsel for the Appellee that it declines to grant such consent on the basis that "... we resist the argument of the Government to the effect that the issue in this case is of sweeping importance and that the decision of the issue will be applied broadly to numerous trades and occupations. . . . United's case should be decided on its own facts and . . . a proper decision in United's case would not affect any other company." The Federation believes, however, that the Court's granting *certiorari* to these proceedings suggests that the Court may regard these cases, as has been true of past Court cases with respect to this

¹ Letter from Counsel for Respondent to Counsel for the Applicant dated December 8, 1967.

issue,² as affecting business relationships other than that of United and its debit agents and as even affecting "numerous trades and occupations" apart from the insurance field.

5. Because of the potential effect on the significant present and future relationships utilized by retail business establishments represented by the Federation as well as because of the Federation's experience and knowledge of patterns of marketing, distribution and independent contractor relationships in the retail field, the Federation's ex-

² Thus, while this Court in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), was narrowly concerned only with the question of whether certain Los Angeles newsboys were "employees" under the National Labor Relations Act, its decision later proved significant with respect to such diverse cases as, for example, those involving the status of driver-loaders of coal trucks under the Social Security Act (*United States v. Silk*, 331 U.S. 704 (1946)), slaughter house boners under the Fair Labor Standards Act (*Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)), and the infinite variety of factual situations that arise under the state unemployment compensation laws (see Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale L. J. 76 (1946)). The potential impact of any decision in this area is vast and far-reaching; one commentator in 1953 estimated that "there is no less than seventy-five federal and [Illinois] state statutes under which it is primarily necessary to ascertain whether an affected person is an employee or an independent contractor." Jacobs, *Are "Independent Contractors" Really Independent?*; 3 De Paul L. Rev. 23 (1953). In addition, of course, the decision may also substantially affect a variety of different relationships in their coverage under the National Labor Relations Act. See, e.g., the impact of the instant cases on the Board and Court of Appeals decisions in *Frito-Lay, Inc. v. National Labor Relations Board*, — F.2d — (7th Cir. November 7, 1967), denying enforcement, 161 NLRB No. 90.

perience and views may be of significant aid to the Court and may not otherwise be presented in the arguments of the parties.³ If permission is granted to file a brief, as *amicus curiae*, it will be short and relevant, so that the Court's time will not be misspent.

Respectfully submitted,

AMERICAN RETAIL FEDERATION

PHILIP C. LEDERER

SHAYLE P. FOX

LAWRENCE M. COHEN

33 South Clark Street
Chicago, Illinois 60603

LEDERER, BARNHILL and FOX
33 South Clark Street
Chicago, Illinois 60603
Of Counsel

³ See, e.g., *United States v. White Motor Company*, 372 U.S. 253, 263 (1963), where in remanding a case involving territorial restrictions in manufacturer-retailer franchises, this Court stated that the territorial limitations "may or may not have that purpose or effect of stifling competition. We don't know enough of the economic and business stuff out of which these arrangements emerge to be certain."

INDEX

	PAGE
INTEREST OF THE AMICUS CURIAE	6
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I CONGRESS INTENDED THAT THE TERM "INDEPENDENT CONTRACTOR" IS TO BE DEFINED BY THE GENERAL PRINCIPLES OF THE LAW OF AGENCY, AND THE BOARD IS TO ADOPT THE ORDINARY, PRESENT DAY USAGE OF THAT TERM	10
II THE COURT BELOW TOOK PROPER COG- NIZANCE OF THE PRESENT DAY BUSI- NESS REALITIES INVOLVED IN THE DELEGATION OF SEPARATE BUSINESS FUNCTIONS TO CONTRACTORS	12
A. THE CRITICAL TEST OF INDEPEN- DENT CONTRACTORSHIP	12
B. THE PRESENT BUSINESS REALITIES OF THE INDEPENDENT CONTRACTOR- SHIP RELATIONSHIP	14
C. THE EFFECT OF PRESENT BUSINESS REALITIES ON GENERAL AGENCY PRINCIPLES: CERTAIN INDICIA ARE NO LONGER APPLICABLE	19
D. THE EFFECT OF PRESENT BUSINESS REALITIES ON THE CRITERIA OF IN- DEPENDENCE: CONCEDEDLY APPLI- CABLE INDICIA MUST BE PROPERLY WEIGHED	22
1. The Extent Of Control Test	22
2. The "Distinct Occupation Or Business" Test; The Occupation Involved And The Skill Required	23
3. The Supply Of Tools And Place Of Work Test	26

	PAGE
4. The Length Of Employment Test	29
5. The Method Of Payment Test	30
6. The Belief Of The Parties, The Regular Business Of The Principal, The Principal In Business Tests	31
III THE UNDESIRABLE INCIDENTS OF A RE- STRICTED DEFINITION OF INDEPEN- DENT CONTRACTORS	32

AUTHORITIES CITED

CASES:

Bowman v. Pace, 119 F.2d 858 (5th Cir. 1941)	18
Fibreboard Paper Products Co. v. National Labor Relations Board, 379 U.S. 203 (1964)	29
Frito-Lay, Inc. v. National Labor Relations Board, F.2d (7th Cir. November 7, 1967)	8
Glenn v. Standard Oil Co., 148 F.2d 51 (6th Cir. 1945)	21
Hearst Publications, Inc. v. National Labor Re- lations Board, 136 F.2d 608 (9th Cir. 1943)	10
National Labor Relations Board v. Hearst Publi- cations, Inc., 322 U.S. 111 (1944)	7, 10, 13
National Labor Relations Board v. Nu-Car Car- riers, Inc., 189 F.2d 756 (3rd Cir. 1951)	13
Radio City Music Hall v. United States, 135 F.2d 715 (2nd Cir. 1943)	13
Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947)	7
The Singer Manufacturing Company v. Rahn, 132 U.S. 518 (1889)	14
United Insurance Company of America v. Nation- al Labor Relations Board, 304 F.2d 86 (7 Cir. 1962)	9, 32
United Insurance Company of America, 120 NLRB 911, 132 NLRB No. 70	13
United States v. Silk, 331 U.S. 704 (1946)	7, 15

STATUTES AND LEGISLATIVE MATERIALS:

National Labor Relations Act, Title 29 USC, Section 151 et seq.	9
H. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947). 1 Leg. Hist. of the Labor Management Relations Act (G.P.O. 1948) 309	11
Cong. Rec., Senate, June 5, 1947, 2 Leg. Hist. of the Labor Management Relations Act (G.P.O. 1948) 1537	11
Senate Bills 2321 and 2507, 90th Congress, 1st Session	17

ARTICLES AND TEXTBOOKS:

Asia, <i>Employment Relation: Common-Law Concept and Legislative Definition</i> , 55 Yale L.J. 76 (1946)	7
Beckman & Davidson; <i>Marketing</i> (8th Ed. 1967)	17
Hall, <i>Franchising, New Scope for an Old Technique</i> , Harv. Bus. Rev. Jan.-Feb. 1964, 63	21, 28, 32
Jacobs, <i>Are "Independent Contractors" Really Independent?</i> 3 DePaul Law Rev. 23 (1953)	8, 33
Katona, <i>The Integrated Approach to Product Planning</i> , 101 Market Services, New York; American Management Association, pp. 56-68 (1957)	25
Kursh, <i>The Franchise Boom</i> (1962)	21
Reiser, <i>The Salesman Isn't Dead—He's Different</i> , Fortune, pp. 124-127, 248, 252, 254, 259 (November 1962) in Britt and Boyd, <i>Marketing Management and Administrative Action</i> , pp. 589-600 (1963)	28
Restatement of the Law of Agency 2d, Section 220	13, 22-24, 27, 29-31
Twitchell, <i>Dealers Rely on Services to Build Future Sales Mart</i> (January, 1967)	26
Twitchell, <i>Better Service—Service Regulations. Build Better TV Sales, Mart</i> (July, 1967)	26
Weiss, <i>The Shrinking Headquarters Target, Sales Management</i> , pp. 44-48 (July 6, 1963) in Britt and Boyd, <i>Marketing Management and Administrative Action</i> , p. 439 (1963)	32

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967.

No. 178

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
UNITED INSURANCE COMPANY OF AMERICA,
et. al.,
Respondents.

No. 179

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents

On Writs of Certiorari to the United States
Court of Appeals for the Seventh Circuit.

**BRIEF AMICUS CURIAE ON BEHALF OF THE
AMERICAN RETAIL FEDERATION**

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereinafter referred to as the "Federation") is an organization composed of

73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

The National Labor Relations Board (hereinafter referred to as the "Board") and the Insurance Workers' International Union, AFL-CIO (hereinafter referred to as the "Union") have each stressed to this Court that the impact of the instant cases extends far beyond the particular United Insurance Company of America (hereinafter referred to as "United") debit agents involved herein. (Board Petition for Certiorari, pp. 12, 13; Union Petition for Certiorari, p. 11.) This contention is at least historically correct: decisions of this Court with respect to the issue of independent contractorship have in the past significantly affected business relationships and long-standing methods of operation governed by statutes far removed from the narrow labor dispute that was actually determined.¹ Accordingly, while the questions now pre-

¹ Thus, while this Court in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), was narrowly concerned only with the question of whether certain Los Angeles newsboys were "employees" under the National Labor Relations Act (hereinafter referred to as the "Act"), its decision later proved significant with respect to such diverse cases as, for example, those involving the status of driver-loaders of coal trucks under the Social Security Act (*United States v. Silk*, 331 U.S. 704 (1946)), slaughter house boners under the Fair Labor Standards Act (*Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)), and the infinite variety of factual situations that arise under the state unemployment compensation laws (see Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale L. J. 76 (1946)). The potential impact of any decision in this area is vast and far-reaching; one commentator in 1953

sented to the Court are framed in limited terms and may be so interpreted by the Court, any decision in these cases may, on the other hand, have far-reaching consequences for the entire retail industry.¹

The concern of the Federation is that the Court, in formulating the legal principles to resolve the broader issues in the instant controversy, should be aware of the manifold permutations of horizontal and vertical relationships of a voluntary, quasi-integrated nature that exist in the retail industry today. Such relationships have rapidly evolved in recent years into an important and dynamic force in the American retail field; any decision which curtails the right of United to choose "to operate

¹ (Continued)

estimated that "there is no less than seventy-five federal and [Illinois] state statutes under which it is primarily necessary to ascertain whether an affected person is an employee or an independent contractor." Jacobs, *Are "Independent Contractors" Really Independent?*; 3 De Paul L. Rev. 23 (1953). In addition, of course, the decision may also substantially affect a variety of different relationships in their coverage under the Act. See, e.g., the impact of the instant cases on the Board and Court of Appeals decisions in *Frito-Lay, Inc. v. National Labor Relations Board*, — F.2d — (7th Cir. November 7, 1967), denying enforcement, 161 NLRB No. 90.

² The *amicus* concurs with United's contention that "the employee or independent contractor status of a particular group of workers can only be determined, under the law, on a case by case, and not on an industry by industry, basis." United Brief in Opposition, p. 14. In view, however, of the broad potential impact of the Court's decision, as discussed in the preceding footnote, the *amicus* submits that if the Court intends that its decision should be so restricted, such a result can only be accomplished by a caveat expressly limiting the decision to the particular factual situation and particular statute involved herein.

its business on the basis that its agents are independent contractors" (*United Insurance Co. of America v. NLRB*, 304 F.2d 86, 91 (7th Cir. 1962)) may, therefore, have a substantial impact on the choice of Federation members as to their own operational methods.

SUMMARY OF ARGUMENT

The purpose of this brief is to discuss the characteristics which we believe may be found common to the debit agent operation of United and the similar type of relationships employed by retail business establishments, represented by the Federation, and to present the Court with the retail industry-wide point of view on these broader ramifications of the instant cases. The thesis of the brief may be summarized thus: the clear Congressional intent in determining that individuals "having the status of an independent contractor" are not "employees" under the National Labor Relations Act, 29 U.S.C. 151, *et seq.* (hereinafter referred to as the "Act"), was to specifically exclude all persons not embraced by the latter term under the general principles of the law of agency, and to require the Board to adopt the ordinary, present-day usage of the terms. The Board, as a result, has been mandated by Congress to take particular cognizance of the present day business realities involved in the delegation of separable business functions to contractors. The court below properly concluded that the Board had failed to reflect Congressional intent in the instant cases. It correctly found, in light of these realities, that the United debit agents were independent contractors under the Act.

ARGUMENT

I.

CONGRESS INTENDED THAT THE TERM "INDEPENDENT CONTRACTOR" IS TO BE DEFINED BY THE GENERAL PRINCIPLES OF THE LAW OF AGENCY AND THAT THE BOARD IS TO ADOPT THE ORDINARY, PRESENT-DAY USAGE OF THAT TERM.

Prior to 1947, there was considerable dispute as to precisely what Congress had intended when it used the undefined term "employee" in the Act. The Board's position, eventually affirmed by this Court in the *Hearst* case,³ was that "where the persons involved function in a realistic economic sense as employees of an industrial enterprise Congress intended them to be within the Act"; the opposite view, as stated by the Ninth Circuit, was that "Congress intended to use the terms 'employer' and 'employee' . . . in their ordinary and conventional sense as understood at the time the statute was enacted . . . there is no delegation to an administrative body of power to determine whether the facts are within a specified exception to a statute, the exercise of which power involves an interpretation of terms." *Hearst Publications, Inc. v. National Labor Relations Board*, 136 F. 2d 608, 611-612 (9th Cir. 1943).

This controversy finally was resolved by Congress when it enacted the Taft-Hartley amendments to the Act. The term "employee", Congress made it clear, had been improperly interpreted by the Board and the Court:

An "employee", according to all standard dictionaries, according to the law as the courts have stated it,

³ *National Labor Relations Board v. Hearst Publications, Inc.*, *supra* note 1.

and according to the understanding of almost everyone, with the exception of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications* (322 U.S. 111 (1944)), the Board expanded the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic "expertness" of the Board, upheld the Board. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wishes. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee". (H. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947); 1 Leg. Hist. of the Labor Management Relations Act (G.P.O. 1948) (hereafter referred to as "Leg. Hist."), 309).

The correct view, according to Congress, was that of the Ninth Circuit. As Senator Taft stated in summarizing the principal differences between the conference agreement and the bill which the Senate passed:

"The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of law of agency." (Cong. Rec., Senate, June 5, 1947; 2 Leg. Hist., 1537) (emphasis supplied).

Although Appellants pay lip service to this Congressional intent in their respective briefs, in effect they choose to disregard the *raison d'être* of the amendment. The Board thus states that "the subsequent infusion of

flexibility into the relevant standards for determining employment status is especially appropriate where the purpose of the inquiry is not to decide the applicability of *respondeat superior* liability, but to determine the coverage of the National Labor Relations Act" and that "the determination whether an individual is an employee or an independent contractor thus allows considerable room for the exercise of Board judgment and discretion . . ." (Brief for Board, pps. 17, 19). The Union's argument is similar. (Brief for Union, p. 52).

The *amicus* believes that such contentions are at the heart of the Appellants' mistaken approach in these cases—an approach which, in short, is precisely that which Congress rejected in 1947. The issue of independent contractorship is not, as the Board argues, a matter of administrative expertise with "considerable room" for the exercise of Board discretion. It is, instead, "always" a legal question to be governed by established common-law rather than any specialized statutory standards. The issue is one that is well within the judgment and experience of a reviewing court.

II.

THE COURT BELOW TOOK PROPER COGNIZANCE OF THE PRESENT DAY BUSINESS REALITIES INVOLVED IN THE DELEGATION OF SEPARATE BUSINESS FUNCTIONS TO CONTRACTORS.

A. THE CRITICAL TEST OF INDEPENDENT CONTRACTORSHIP.

Any attempt to define the independent contractor relationship under common law agency principles, as illuminated by the "ordinary and conventional" usage of the modern business world, admittedly does not lend itself

to "some simple uniform and easily acceptable test."⁴ The court below, nevertheless, could, without dispute, state that "the critical test" is the "right to control the manner and means by which the agent conducts his business", the same test as that which this Court in *Hearst* indicated had evolved "for deciding whether one who hires another is responsible in tort for his wrongdoing."⁵

The controversy lies in determining when the requisite control by the principal of the details of the agent's performance is present. More specifically, it involves the relative values to be accorded each of the Restatement criteria⁶ giving full consideration to the methods of doing business today.⁷ It is the purpose of this effort, as *amicus*,

⁴ *National Labor Relations Board v. Hearst Publications, Inc.*, *supra* note 1.

⁵ See, also, e.g., *NLRB v. Nu-Car Carriers, Inc.*, 189 F. 2d 756 (3rd Cir. 1951) and *Radio City Music Hall v. United States*, 135 F. 2d 715, 717 (2nd Cir. 1943). In the latter case, Judge Learned Hand proclaimed, "The test lies in the degree to which the principal may intervene to control the *details* of the agent's performance; and that in the end is all that can be said . . ." (Italicized in the original). The Restatement similarly places the control test at the head of its list of determining factors in determining independent contractorship, stating it to be "(a) the extent of control which, by the agreement, the master may exercise over the details of the work." (Restatement of the Law of Agency 2d, § 220(2) (1958) (hereafter referred to as "Restatement")).

⁶ Both Appellants accept these criteria as establishing, in general, the tests for determining the relationship.

⁷ For example, in both the present case and the previous United debit agent decisions (*United Insurance Company of America*, 120 NLRB 911; *United Insurance Company of America*, 132 NLRB 885), the Board rejected proffered evidence that, in addition to debit agents, the sales function of United had also been delegated to general insurance agencies, admittedly not "employees" of United, who operated under the same "controls" as those maintained in the case of debit agents.

to collimate the attention of the Court on presently existing business realities, particularly in the retail industry, before discussing such relative values and applying the criteria to the facts in this case.

B. THE PRESENT BUSINESS REALITIES OF THE INDEPENDENT CONTRACTORSHIP RELATIONSHIP.

A cogent example of the necessity for a dynamic assessment of the traditional standards is presented by the Union's citation of *The Singer Manufacturing Company v. Rahn*, 132 U.S. 518 (1889). This Court was there called upon to determine the status of a salesman who drove his horse and wagon over a route directed by his principal. The simplicity of the Singer Company salesman's operation, when contrasted to the complex operation of the United debit agent, is due not as much to the contractual intent of the parties as to the evolution in the business world.

Competition to meet customers' exacting demands for a wide selection of goods and extensive services has imposed upon every retailer the imperative of specialized attention to each phase of its business. A "new breed" of specialists has become necessary to assure efficiency in every link of the chain of distribution of goods and services from production to consumption. Few companies can economically possess such specialists; independent

7 (Continued)

This significant omission is the result, no doubt, of the Board's refusal to properly consider the general agency principles mandated by Congress and its concomitant refusal to look to contemporary established business practices to determine whether the "controls" exercised in a given case bring the relationship involved within the ambit of the Act.

contractors, therefore, have become a necessary and integral component in numerous significant functions heretofore usually considered to be a part of the business of the principal.

In *United States v. Silk*, 331 U.S. 704, 714 (1946), this Court recognized that "few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors." In the twenty-one years which have elapsed since that pronouncement, the broad categories of production, manufacturing and distribution have proliferated into numerous subdivisions, many growing into large separate industries. Business arrangements which were unusual or unknown in that day now have become commonplace. Today, the services of independent contractors, each with their own distinct occupation and specialized expertise, are available for performing almost every distinct function in all areas of the business world.

Particularly in the retail industry, the relatively small entrepreneurs have maintained their existence solely by virtue of the availability of these necessary specialty services through contract arrangements. Specialists have made merchandise available to the smaller retailer, and sales available to the smaller manufacturer, at a cost and investment which enables them to compete with the giant corporate structures that have evolved in the industry. To deal with manufacturers in obtaining goods for the retailer, there are contractors performing as purchasing agents, jobbers, brokers, cooperatives, franchisors, licensors and others. To sell the manufacturers' goods to the consumer, there are contractors performing as sales agencies, brokers, franchised or licensed dealers, conces-

sionaires and leased departments within a retail establishment and others. Consumer credit, which the smaller retailer may not be able to afford to provide, can be arranged for customers by contracts with banks or other lending institutions. Local cartage firms will contract to handle delivery to customers of the smaller stores which cannot afford their own trucks and drivers. Installation and repair firms will contract to undertake the service warranties required of even the smallest retailers. Independent advertising agencies can provide the talent and skill which the small retailer cannot economically maintain as part of his own organization. Market research firms are available to advise the retailers as to taking on new lines and effectively pricing goods for sale. Further, contractors will maintain their premises, repair their fixtures and equipment, arrange their window displays, guard their premises and transport their money amongst other necessary services available to the smaller retailer. Even the corporate giants in the retail field may utilize some or all of these contractors in order to obtain the expertise which they are unable, satisfactorily or economically, to provide through their own organization.

Viewed from the other side of the coin, the various specialties discussed above not only enable smaller merchants to survive, they also provide business opportunities for the entrepreneurs willing and able to provide such services to retailers. The evolution of corporate giants in the retail field, therefore, has not obviated the need for the small business entrepreneur but, instead, has created entire new markets for his services.

This Court's statement in *Silk*, was thus more than an accurate observation of that date. It was a prophesy of economic development, particularly in the retail industry. This phenomenon of voluntary cooperation be-

tween retailer and contractor, sometimes referred to as quasi-integration,⁸ has taken varied forms as numerous as the myriad products and services provided thereunder.⁹ Retailer-cooperative voluntary groups,¹⁰ wholesaler-sponsored voluntary chains,¹¹ voluntary affiliates of corporate chains,¹² and franchised retail outlets¹³ are general cate-

⁸ Beckman & Davidson, *Marketing*, 293-297 (8th Ed. 1967)

⁹ These arrangements vary from small groups of minimal investment neighborhood establishments (such as custard drive-ins and "Ma and Pa" retailers) to associations of hundreds of substantial enterprises circling the world (such as discount chains with leased departments and concessions).

¹⁰ "Retailer-cooperative voluntary group" describes retail store owners combining to establish their own wholesale house. Independent co-operative groceries are good examples.

¹¹ "Wholesaler-sponsored voluntary chain" describes a distributor licensing store owners in the use of its name and sources of merchandise. Examples cited in Beckman & Davidson, *Marketing*, *supra* at note 8, are McDonald Drive-Ins and IGA (Independent Grocers Alliance) Food Stores.

¹² "Voluntary affiliates of a corporate chain" describes a license arrangement by which a local, privately owned store can operate as a member of a large chain. Examples cited in Beckman & Davidson, *Marketing*, *supra* at note 8, are Western Auto Associate stores and Walgreen Drug Agency stores.

¹³ "Franchising" is a general term including any agreement between one who manufactures, processes or distributes goods (or directs services) and another who is granted the right to sell and distribute. As Senator Philip A. Hart recently stated in a hearing before the Anti-Trust and Monopoly Subcommittee of the Senate Judiciary Committee concerning Senate Bills S. 2321 and S. 2507: "We know that franchising has assumed an important role in the distribution of goods in the market place. Indeed, franchising accounts for 10 percent of the gross national product and 25 percent of all retail sales. Today, 400,000 businessmen are franchisers." (Statistics cited in Section 2(a) of S. 2507, 90th Cong., 1st Session)

gories of these cooperative arrangements. In each case, the participants are principals who have contracted out a function—whether it be buying,¹⁴ retailing¹⁵ or service¹⁶—that they have decided cannot be efficiently or economically performed by themselves.

In determining the status of the United debit agent, the Court should take cognizance of the effect of its decision on these special business relationships in the retail industry. These newly evolved patterns of business create a niche for small entrepreneurs in today's economy. The impact of the decision in this case could be disruptive to these patterns and deprive many small business men of their entrepreneurial opportunities.

¹⁴ Thus, buying has been contracted out in the retailer-cooperative voluntary group and wholesaler-sponsored voluntary chains to enable the retailer to obtain quantity discounts on prices, to have specialized people performing purchasing, to reduce delivery costs by arranging car load shipments and to provide a large, readily available inventory without investments of capital beyond the means of individual participants.

¹⁵ Examples of contracting out the retail function are found in the voluntary affiliates of corporate chains and franchised retail outlet categories. These arrangements enable the chain operator, the manufacturer or the owner of a process or idea, to provide himself with distribution to consumers by delegating the responsibility for the operation of the retail outlet. By delegation, he may obtain capable operators known in the community, possessing knowledge of special local conditions, thus allowing him to operate at a greater volume with a minimum capital investment.

¹⁶ For example, the functions performed by advertising agencies, credit institutions, market surveyors, public relations firms, security agents (*Bowman v. Pace Co.* 119 F. 2d 858 (5th Cir. 1941)) and others of the same genre.

C. THE EFFECT OF PRESENT BUSINESS REALITIES ON GENERAL AGENCY PRINCIPLES: CERTAIN INDICIA ARE NO LONGER APPLICABLE.

The multiple variations that quasi-integration has taken in today's business world materially affects the definition of independent contractor. This effect is a negative, as well as a positive one; it discloses not only what is of significance in defining an independent contractor but also what is irrelevant and misleading.

It is irrelevant and misleading, for example, to approach the issue of independent contractor from the standpoint of the principal, comparing those functions he has delegated with those he has chosen to retain.¹⁷ It is also of no value to inquire whether the principal has retained some of the same functions he has chosen to delegate.¹⁸

The above approaches determine the issue of independent contractorship by looking through the wrong end of the glass. The only relevant inquiry is from the standpoint of the contractor and to examine only that special part of the principal's business for which the contract was let. It is of no regard whether that same part of the business or a similar part has been or is also contracted to others or retained by the principal. It is also of no regard how small

¹⁷ In the instant case, United has chosen to contract only its sales and premium collections functions to debit agents. The retention by United of other functions such as underwriting or risk selection, pricing, terms of policies offered and other aspects of the insurance business cannot, therefore, be considered as any reservation of control over the details of the debit agent's performance.

¹⁸ If United had chosen to supplement independent agencies with its own employees, obviously this factor would not make the agencies any less independent.

the part may be when compared with the breadth of the principal's entire operation. It is only important to review, from the contractor's point of view, the restrictions placed on the contractor's ability to perform independently his special assigned task. Restrictions or limitations as to other functions which the principal has chosen to be performed by himself are immaterial.¹⁹

Similarly, while the degree of principal-contractor assistance has been given weight in consideration of the relationship, technical assistance and supervision must be distinguished. The mutual best interests of both the principal and the contractor are clearly served by following the course most likely to achieve the desired results. The principal, naturally, should and will do whatever is feasible to assist the contractor in successfully fulfilling his delegated role. The principal may prepare and issue "how to do it" literature and other publications for the use of the contractor which set forth in minute detail how the task contracted can best be performed. There may also be regular, comprehensive training sessions, instructions and professional assistance by the principal at the

¹⁹ In the retail field, for example, functions retained by the principal in the delegation to contractors are common, often including reservations with respect to product selection (as, e.g., the restriction on selling competitive products prevalent in the automobile, shoe, gasoline station and soft drink bottling industries), merchandise pricing (as, e.g., the obligation to conform to the principal's price dictates prevalent in the food, drug and shoe industries), credit (as, e.g., the gasoline industry), merchandise buying and the territory to be served. Moreover, the contractor will also have no authority or responsibility with respect to the actual product itself. The debit agent thus must sell the insurance policy United will issue, the auto dealer must sell the car that comes out of the factory; neither indicates that the contractor is any less independent.

commencement of the contractorship and at frequent intervals thereafter, periodic inspections by the principal, advertising and promotion assistance, investigation of complaints by the principal, and so on.²⁰ None of these types of mutually beneficial assistance are intended to, or function, as "controls" over the *details* of the agent's performance. Rather, they are used solely to insure the successful *results* of the co-operative endeavor:

The principal may also impose "controls" over the conduct of the contractor to protect his name, reputation and property. It would be wholly unreasonable to expect that a principal would leave such valuable assets to the unfettered discretion of the contractor. Thus, the principal may require the contractor to protect and preserve property in his control,²¹ to operate according to specified health, safety and moral standards,²² or to provide designated customer services.

The principal may also desire, as in the case of United, that the contractor adhere to established reporting and accounting procedures; this may be a requirement of standardized or electronic data processing, uniform accounting policies, or remittance "controls" in cases where the contractor has funds of the principal, and, particularly, where the contractor may deduct his remunera-

²⁰ See, e.g., Hall, *Franchising—New Scope for an Old Technique*, Harv. Bus. Rev., Jan.-Feb. 1964, 63; Kursh, *The Franchise Boom* (1962).

²¹ See, e.g., *Glenn v. Standard Oil Co.*, 148 F.2d 51 (6th Cir. 1945).

²² E.g., cleanliness standards in gasoline service stations or quality and hygiene standards in food franchise operations.

tion directly from receipts.²³ Such requirements relating to the time and nature of performance are often, as in the case of various independent tradesmen, the essential ingredient of the result desired. "Controls" of this nature do not properly militate against the independent contractor status. The critical factor is whether the physical details of performance are left to the skill and judgment of the contractor; the regulation of mere incidentals required by business needs is extraneous to any determination of his "independence".

D. THE EFFECT OF PRESENT BUSINESS REALITIES ON THE CRITERIA OF INDEPENDENCE: CONCEDEDLY APPLICABLE INDICIA MUST BE PROPERLY WEIGHED.

The "independence" of a contractor is determined by reviewing his relationship by each of the Restatement criteria. The relative values assigned these criteria, however, must reflect the practices and conventional usage prevalent in business today.

1. The Extent of Control Test.

The initial Restatement test is the extent of control which the principal may exercise over the details of the agent's work.²⁴ The significant word is "details"; as discussed above, a principal may exercise considerable "control" over the essence of the contractor's work and various matters coincident thereto without any significant effect on the independent judgment and skill required. Such "controls" do not accurately gauge independent contrac-

²³ In the instant cases, similar reporting and remittance "controls" were imposed on both the debit agents and the independent agency of Garfinkel.

²⁴ Restatement, Section 220 (2) "... (a) the extent of control which, by the agreement, the master may exercise over the details of the work; ..."

tership. It is the presence or absence of specifications as to "how" the results of the task delegated are to be achieved—the direction of the physical details of performance—that reflect the type of control envisaged by the Restatement. The United debit agent, under this test, is "on his own" in performing his occupation in the field and is required to use his personal ability and independent initiative. The court below properly concluded, therefore, that "controls" such as those imposed on the debit agent are

"... consistent with an independent contractor status. They are not indicative of an existence or exercise of control directed to the 'manner and means' by which the result to be produced by the agent is to be accomplished, but only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors."

2. The "Distinct Occupation or Business" Test: the Occupation Involved and the Skill Required.

The need for contemporary review is perhaps greatest in the area of inquiry as to whether the agent is engaged in a "distinct occupation or business."²⁵ The technical

²⁵ Although listed separately, the following Restatement, Section 220(2) tests are interrelated and should be discussed jointly:

"... (b) whether or not one employed is engaged in a distinct occupation or business;

"(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

:"(d) the skill required in the particular occupation; ..."

complexities of products and services and the high standards of performance required by competition have, as discussed above, created the need for skillful specialists in narrow subdivisions of the manufacturing, production and distribution functions. The hallmark of these specialists is their skill in performing their individual, unique function. It matters little whether such skill is acquired by means of instruction and training from the principal in an independent contractor relationship, or whether it is the result of inherent ability or prior experience.²⁶ It is similarly irrelevant to determine whether the specialist utilizes these skills on behalf of one principal or several. The only significant fact is the degree of skill involved during the performance of the specialist: the greater the skill, the more likelihood that the specialty is a distinct occupation of business.²⁷

Measured by the above guidelines, the skill required of the United debit agent is apparent. The separate phases of his occupation—selling, collecting and servicing—are all indispensable to the retail process. They each require distinct skills. In today's complex business world, more than humble ability is required to succeed in any of these three fields of endeavor.

²⁶ The Board and Union incorrectly place great emphasis upon the fact that no prior insurance experience is required for the engagement of debit agents by United. This position imposes a test of special skill *before* engaging a contractor; the distinct occupation test, however, requires only that the contractor possess special skill *during* performance.

²⁷ Significantly, while the Board lists virtually all of the Restatement criteria as factors which must be assessed and weighed in determining independent contractorship, one of the most critical tests, the skill required, is omitted altogether. Brief for the Board, p. 18.

Salesmanship is a highly developed art in business today.²⁸ It is taught in commerce colleges as a requirement to the marketing degree. Further, the salesman is compelled to understand the oft-times complicated commodity he is offering.²⁹ Selling is conceded as one of the highest paying occupational groups in the entire economy.

The collection function also has become of great importance with the phenomenal growth of credit sales.³⁰ An infinite variety of products and services are now available to most people on credit. Commensurate with the growth of this form of retailing, collection has become a special skill practiced by both large corporate structures³¹ and individual collection agents offering their services to one or more principals.

The third aspect of the debit agent's job, service,³² has likewise become a vital factor in successful retailing

²⁸ Reiser, *The Salesman Isn't Dead—He's Different*, 66 *Fortune*, pp. 124-127, 248, 252, 254, 259 (November, 1962) in Britt and Boyd, *Marketing Management and Administrative Action*, pp. 589-600 (1963).

²⁹ Insurance salesmen must be masters of the art of selling. Insurance is only a contract right evidenced by a printed piece of paper. It can be used neither to feed, clothe or shelter the purchaser. It is difficult to apprise a potential customer of such a future need for which present payment is exacted. Success in this field requires a high degree of sales ability. Further, ordinary insurance is traditionally sold through specialized brokers and independent sales agents, as recognized by the court below.

³⁰ Katona, *The Integrated Approach to Product Planning*, 101 Market Services, New York: American Management Association, pp. 56-68 (1957).

³¹ Credit agencies, such as Dun & Bradstreet and numerous commercial banks, for example, are active in the consumer credit collection field.

³² The debit agent's customer, the policy holder, has purchased an esoteric contract right and frequently understands no more than the fact that, at his death, the

today.³³ In order to sell his products, the retailer must provide delivery and installation. This function frequently requires the combined technological skills of a plumber, electrician, mechanic, mason and carpenter. Similarly, in order to keep his product sold under the warranties which competition have dictated, repairs involving the use of the same, varied skills as installers must be supplied to the customer.³⁴ Retail service today, as a result, is performed by persons combining many skills, each of which traditionally constitutes a distinct occupation.

The United debit agent's function thus involves considerable skill. He is clearly a specialist in today's business world and engaged in a distinct occupation or business.

3. The Supply of Tools and Place of Work Test.

The Union has contended that in the instant case the Company "alone provides whatever instrumentalities and tools are required in the agents' work: the accumulated policy holders; the insurance policies; the sales promotion literature; the forms; the Rate Book."³⁵ Several sig-

³² (Continued)

face value of the policy will be paid his beneficiary. Policy holder questions can arise concerning optional settlement, loan possibilities, termination, and a host of other contractual privileges undoubtedly couched in complicated legal terminology in the insurance contract. It is the debit agent's duty to explain to the policy holder his rights and process his demands; to service, if you will, the product which has been sold.

³³ Twitchell, *Dealers Rely on Service to Build Future Sales*, Mart (January, 1967); Twitchell, *Better Service—Service Regulations Build Better TV Sales*, Mart (July, 1967).

³⁴ The demand for these combined skills today far exceeds the supply. See *Service Labor Summary*, 32 Home Appliance Building Magazine (July, 1967).

³⁵ Brief for Union, p. 62.

nificant fallacies lie in this overly-simplified view. The first error is that it misconstrues the "tools" which the agent must depend on for success.³⁶ The debit agent's job cannot be equated to that of a laborer working with a pick and shovel; his "tools" are considerably more subtle and sophisticated. In order to sell a policy, collect a premium or service an account, the debit agent, in addition to a high degree of skill, requires customers, considerable time, a mode of transportation and an effective "sales personality". These are the real tools of the trade, and in each case they are furnished solely by the agent himself and not United.³⁷ The type of "tools" which the Union has noted are, in fact, only forms of incidental or mutually-beneficial management assistance which, as discussed above, do not restrict the details of the agent's performance.^{37a}

Secondly, the Union's approach involves only considerations of efficiency and financial arrangement. It would be the height of inefficiency, for example, to require the agent to prepare his own policies, forms, sales literature and rate books. In addition, while United could, perhaps,

³⁶ The Restatement, Section 220(2) test is: "... (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; ..."

³⁷ The only "tools and instrumentalities" referred to in the salesmen illustrations as to this test set forth in the Comment to Section 220(2) of the Restatement (p. 491) are the salesman's time, his automobile and the right to call on those whom he pleases. The Comment, significantly, concludes that even though a salesman "agrees to give full time to the work but furnishes his own car, is paid by commission and can call on those whom he pleases," it is inferred that the salesman is *not* a servant.

^{37a} In the automobile and television distribution and service franchises, for example, detailed price lists and service manuals are made available to the franchisee who is clearly independent despite heavy reliance upon the manufacturer in this regard.

require the agent to provide his own office replete with stenographic help, files and office equipment to use on those infrequent occasions that the agent utilizes the district office, the effect of such a requirement could make little difference as to the remuneration of the agent,³⁸ and no difference at all as to the manner and means which he may choose to perform his assigned tasks.³⁹ Thus, whether necessary capital or capital assets of this nature are supplied by the principal, by the contractor, or by

³⁸ As discussed in Hall, *supra* note 20 at 69-70 certain franchisors provide their dealers with stores, complete with inventory and fixtures, while other franchisors require their franchisees to provide their own stores. Some principals also offer financial assistance to the contractor through direct loans or by guaranteeing bank loans while others require the franchisee independently to provide his own capital. No matter which form the transaction takes, the financial arrangement must include an interest factor for a return on invested capital to the party supplying the capital on the one hand and interest on borrowed money to be paid on the other hand. In either case, the return to one or cost to the other then becomes a factor in determining profit and will directly influence the contractor's commission arrangement.

³⁹ Moreover, the district office's function in the instant case is more than just a matter of providing the agent with needed physical assets. It is also a convenient means of auditing results of the agent's performance. By having a central location for agents to report and store their records, United is more efficiently and more economically able to obtain current information as to the agent's performance. Similarly, for example, delivery, installation and service contractors in the retail industry frequently report to a central office supplied by the principal. The decision is predicated upon considerations of efficiency and economics and not upon the degree of desired independence.

an outside source should not influence the decision as to the contractor's degree of independence.⁴⁰

4. The Length of Employment Test.

The Restatement, Section 220(2), also lists as a criterion "... (f) the length of time for which the person is employed; ...". This test is of little significance, however, where a continuous need, rather than a single accomplishment, is desired. In the retail industry, for example, many delivery installation and service contractors, whose continuous performance satisfies a constant requirement of the principal, continue to perform virtually exclusively⁴¹ for that principal as long as they produce the desired results.⁴²

This type of relationship is no different from a choice by any businessman to purchase continually from a satisfactory source of supply or to sell continuously to a good customer. The contractor is also satisfied as long as the prin-

⁴⁰ See the discussion of the independent contracting of plant maintenance work in *Fibreboard Paper Products Co. v. National Labor Relations Board*, 379 U.S. 203 (1964), where at page 213, this Court stated:

"The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an individual contractor to do the same work under similar conditions of employment."

⁴¹ Local delivery companies, ranging in size from single truck to multi-vehicle, are a good example.

⁴² A contractor who determines that one principal can provide him with sufficient profit opportunity so that he excludes other contracts is no less independent than one who gets a small amount of work from many principals. In fact, the reasonable assurance of substantial work and income from one source might tend to make a contractor more independent than one who needs every job he can obtain and is willing to part with his independence in order to obtain work.

principal continues to provide a relatively permanent source of satisfactory income.

United likewise has a continuous need for sales and collection of its insurance policies and as long as the debit agent produces results there would be no reason to terminate the relationship.⁴³ Similarly, as long as the debit agent is satisfied with his commission arrangement and the product of United that he sells, he will continue the established relationship.

5. The Method of Payment Test.

Incentive payments may be made to both employees or independent contractors without evidencing the nature of the relationship. Perhaps the only real distinction with regard to this test⁴⁴ is whether there is any limitation on the minimum and maximum that can be earned by the contractor and the actual disparity between different contractors' earnings.

Significantly, the debit agent is guaranteed no income and, in fact, may lose money if his transportation and promotional expenses exceed his commission income. On

⁴³ While some courts have considered the right of the principal to terminate a relationship at will as circumstantial evidence of employee status, this test is invalid where there is a continuous need. In such case, an at-will relationship is no less significant of independence than if the contract cannot be terminated for a fixed period of time. Similarly, contracts of employment today are just as often as not written for a stated period of time during which they may not be terminated, particularly where skilled personnel are involved.

⁴⁴ The Restatement, Section 220(2) test is described as "... (g) the method of payment, whether by the time or by the job; ...".

the other hand, if the agent is efficient, economical⁴⁵ and successful, his income could be virtually unlimited. The actual disparity between the incomes of the debit agents involved in these cases—\$7,000 to \$20,000—reflects the payment by the job performed standard contemplated by the Restatement. The agents are clearly in a business of their own from which they can reap a substantial profit based on their own efforts.

6. The Belief of the Parties, the Regular Business of the Principal, the Principal in Business Tests.

It is axiomatic that an entrepreneur is in business to make a profit. Today he has a choice, in the management of his affairs, whether to achieve this result by his own individual efforts, to have certain business functions performed by employees or to contract out a portion of the endeavor to independent contractors. The contractor, no less a business entrepreneur than his principal, has decided to go into his own business, subjecting his income production to the vicissitudes of economic conditions and his own ability to exercise initiative and discretion.⁴⁶

United has chosen to perform a portion of its sales function through independent contractors rather than its own employees. The debit agents have chosen to establish their own businesses to sell United's insurance rather than oper-

⁴⁵ The agent, for example, has the power to employ assistants. It is his decision as to whether the additional income justifies the expense.

⁴⁶ The Restatement tests are:

"... (h) whether or not the work is a part of the regular business of the employer;

"(i) whether or not the parties believe they are creating the relation of master and servant; and

"(j) whether the principal is or is not in business."

ate as employees. The parties must remain free to make these fundamental choices. If "United has chosen to operate on the basis that its agents are independent contractors . . . it (has) the complete legal right so to do." *United Insurance Co. of America v. NLRB*, 304 F.2d 86, 91 (7th Cir. 1962).

III.

THE UNDESIRABLE INCIDENTS OF A RESTRICTED DEFINITION OF INDEPENDENT CONTRACTOR.

In assessing the broadly based and highly developed utilization of independent contractors in the contemporary retail field, an overall, composite conclusion is apparent: the increased reliance on the use of contractor-specialists by both large and small businessmen has resulted in a mutually-satisfactory and vital cooperative endeavor. The larger businesses have thus come to rely upon the expertise and skill of such contractors, particularly in new or economically uncertain areas of their operation. At the same time, the small retailer has been able to meet both increased consumer demands and larger, heavily integrated competition⁴⁷ by contracting to specialists those functions which he cannot either efficiently or profitably undertake himself. Concomitantly, other entrepreneurs, willing to risk their efforts and rely on their individual initiative and judgment for rewards beyond a pay check, have been provided with the opportunity to establish and engage in their own business by supplying these specialized functions to all sectors of the retail industry.⁴⁸

⁴⁷ Weiss, *The Shrinking Headquarters Target*, Sales Management, pp. 44-48 (July 6, 1963) in Britt & Boyd, Marketing Management and Administrative Action, p. 439 (1963).

⁴⁸ Hall, *Franchising—New Scope for an Old Technique*, *supra* note 20; Kursh, *The Franchise Boom*, *supra* note 20.

This highly satisfactory solution to the increased complexities of retailing today should not be discouraged by imposing an employment relationship on intended self-employeds. Encompassing the debit agents, and others similarly legally situated, in an employment status would impose liability on the principal under *respondent superior* as well as the multitude of federal and state statutes referred to earlier.⁴⁹ The inevitable consequence of such liability would be the need for the principal to exercise high degrees of control and supervision in order to protect himself, thereby eliminating the independence of the small contractor. The increased burdens of imposing and enforcing these controls, moreover, would eventually create a counter trend to have employees, rather than contractors, perform the requisite specialized functions; the former advantages of contractorship—cost, efficiency and consumer appeal—would become insignificant when weighed against the burdens of necessary control. In short, relegating such businessmen to the legal status of employees would be a diseconomy and detriment to the retailer and consumer alike. It would also result in a serious erosion of the entrepreneurial spirit and incentive which has traditionally been one of the hallmarks of the American economy.

⁴⁹ Jacobs, *Are Independent Contractors Really Independent?* *supra*, note 1.

CONCLUSION

The status of independent contractors is to be determined under the common law tests of agency. Congress has declared that the statutory term is to be defined with reference to its ordinary usage and contemporary business realities and is not to be governed by loose standards of administrative discretion. These were the criteria utilized by the court below.

The relationship of United and its debit agents, therefore, was properly found to be one of principal and independent contractor, and, accordingly, the decision of the court below should be affirmed.

Respectfully submitted,

AMERICAN RETAIL FEDERATION
Amicus Curiae

By PHILIP C. LEDERER
SHAYLE P. FOX
LAWRENCE M. COHEN
33 South Clark Street
Chicago, Illinois 60603

LEDERER, BARNHILL and FOX
33 South Clark Street
Chicago, Illinois
Of Counsel.

SUPREME COURT OF THE UNITED STATES

Nos. 178 AND 179.—OCTOBER TERM, 1967.

National Labor Relations Board,
Petitioner,

178

v.

United Insurance Company of
America et al.

Insurance Workers International
Union, AFL-CIO, Petitioner,

179

v.

National Labor Relations
Board et al.

On Writs of Certiorari
to the United States
Court of Appeals
for the Seventh
Circuit.

[March 6, 1968.]

MR. JUSTICE BLACK delivered the opinion of the Court.

In its insurance operations respondent United Insurance Company uses "debit agents" whose primary functions are collecting premiums from policyholders, preventing the lapsing of policies, and selling such new insurance as time allows. The Insurance Workers International Union, having won a certification election, seeks to represent respondent's debit agents, and the question before us is whether these agents are "employees" who are protected by the National Labor Relations Act or "independent contractors" who are expressly exempted from the Act.¹ Respondent refused to recognize the Union claiming that its debit agents were independent contractors rather than employees. In the ensuing unfair labor practice proceeding the National Labor Relations Board held that these agents were employees and or-

¹ The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*), protects an "employee" only and specifically excludes "any individual having the status of an independent contractor." (§ 2 (3).)

2 LABOR BOARD v. UNITED INSURANCE CO.

dered respondent to bargain collectively with the Union. 154 N. L. R. B. 38. On appeal the Court of Appeals found that the debit agents were independent contractors and refused to enforce the Board's order. 371 F. 2d 316 (C. A. 7th Cir.). The importance of the question in the context involved to the administration of the National Labor Relations Act prompted us to grant the applications of the Board and the Union for certiorari.

— U. S. —

At the outset the critical issue is what standard or standards should be applied in differentiating "employee" from "independent contractor" as those terms are used in the Act. Initially this Court held in *NLRB v. Hearst Publications*, 322 U. S. 111, that "Whether . . . the term 'employee' includes [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation." 322 U. S., at 124. Thus the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor" from the definition of "employee" contained in § 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act.² And both petitioners and respondent agree that the proper standard here is the law of agency. Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.

² See 93 Cong. Rec. 6441-6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947. (G. P. O. 1948), p. 1537. See also H. R. Rep. No. 245, 80th Cong., 1st Sess., 18, 1 Leg. Hist. 1947, p. 309; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 32-33, 1 Leg. Hist., 1947, pp. 536-537 (conference report).

LABOR BOARD v. UNITED INSURANCE CO. 3

Since agency principles are to be applied, some factual background showing the relationship between the debit agents and respondent company is necessary. These basic facts are stated in the Board's opinion and will be very briefly summarized here. Respondent has district offices in most States which are run by a manager who usually has several assistant managers under him. Each assistant manager has a staff of four or five debit agents, and the total number of such agents connected with respondent company is approximately 3,300. New agents are hired by district managers; after interviews; they need have no prior experience and are assigned to a district office under the supervision of an assistant district manager. Once he is hired, a debit agent is issued a debit book which contains the names and addresses of the company's existing policyholders in a relatively concentrated geographic area. This book is company property and must be returned to the company upon termination of the agent's service. The main job of the debit agents is to collect premiums from the policyholders listed in this book. They also try to prevent the lapsing of policies and sell new insurance when time allows. The company compensates the agents as agreed to in the "Agent's Commission Plan" under which the agent retains 20% of his weekly premium collections on industrial insurance and 10% from holders of ordinary life, and 50% of the first year's premiums on new ordinary life insurance sold by him. The company plan also provides for bonuses and other fringe benefits for the debit agents, including a vacation-with-pay plan and participation in a group insurance and profit-sharing plan. At the beginning of an agent's service an assistant district manager accompanies the new agent on his rounds to acquaint him with his customers and show him the approved collection and selling techniques. The agent is also supplied with a company "Rate Book," which the agent

4 LABOR BOARD v. UNITED INSURANCE CO.

is expected to follow, containing detailed instructions on how to perform many of his duties. An agent must turn in his collected premiums to the district office once a week and also file a weekly report. At this time the agent usually attends staff meetings for the discussion of the latest company sales techniques, company directions, etc. Complaints against an agent are investigated by the manager or assistant manager, and, if well founded, the manager talks with the agent to "set him straight." Agents who have poor production records, or who fail to maintain their accounts properly or to follow company rules, are "cautioned." The district manager submits a weekly report to the home office, specifying, among other things, the agents whose records are below average; the amounts of their debits; their collection percentages, arrears, and production; and what action the district manager has taken to remedy the production "let down." If improvement does not follow, the company asks such agents to "resign," or exercises its rights under the "Agents Commission Plan" to fire them "at any time."

There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor,³ and this case presents such a situation. On the one hand these debit agents perform their work primarily away from the company's offices and fix their own hours of work and work days; and clearly they are not as obviously employees as are production workers in a factory. On the other hand, however, they do not have the independence, nor are they allowed the initiative and decision-making authority, normally associated with an independent contractor. In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of

³ See annotated cases in 55 A. L. R. 289 *et seq.* and 61 A. L. R. 218 *et seq.*

the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles. When this is done, the decisive factors in this case become the following: the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the "Agent's Commission Plan" that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory. Probably the best summation of what these factors mean in the reality of the actual working relationship was given by the chairman of the board of respondent company in a letter to debit agents about the time this unfair labor practice proceeding arose:

"... if any agent believes he has power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to make the agent's final.

"The company is going to have its business managed in your district the same as all other company

6 LABOR BOARD v. UNITED INSURANCE CO.

districts in the many states where said offices are located. The other company officials and I have managed the United Insurance Company's operations for over 45 years very successfully, and we are going to continue the same successful plan of operation, and we will not allow anyone to interfere with us and our successful plan."

The Board examined all of these facts and found that they showed the debit agents to be employees. This was not a purely factual finding by the Board, but involved the application of law to facts—what do the facts establish under the common law of agency: employee or independent contractor? It should also be pointed out that such a determination of pure agency law involved no special administrative expertise that a court does not possess. On the other hand, the Board's determination was a judgment made after a hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just because a court would, as an original matter, decide the case the other way. As we said in *Universal Camera Corp. v. NLRB*, 340 U. S. 474, "Nor does it [the requirement for canvassing the whole record] mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U. S., at 488. Here the least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should have enforced the Board's order. It was error to refuse to do so.

Reversed.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.